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No. 15113

United States
Court of Appeals
for the Ninth Circuit

GOODYEAR FARMS, a Corporation; ADAMAN
MUTUAL WATER COMPANY, a Corpora-
tion; B. W. MULLINS, JAMES H. SHARP,
GEORGE W. BUSEY, CARLON H. HIN-
TON and VERNA HINTON, His Wife, et al.,
Appellants,
vs.

UNITED STATES OF AMERICA,
Appellee.

GOODYEAR FARMS, a Corporation; ADAMAN
MUTUAL WATER COMPANY, a Corpora-
tion; BILL W. MULLINS and RALPH
ASHBY and GRACE ASHBY, Husband and
Wife,
Appellants,
vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Arizona

No. 15113

United States
Court of Appeals
for the Ninth Circuit

GOODYEAR FARMS, a Corporation; ADAMAN
MUTUAL WATER COMPANY, a Corpora-
tion; B. W. MULLINS, JAMES H. SHARP,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Phoenix, Arizona;

Attorneys for Appellees.

In the United States District Court
for the District of Arizona

No. 1949

UNITED STATES OF AMERICA,

Plaintiff,

vs.

238.77 ACRES OF LAND, More or Less, Situate
in Maricopa County, State of Arizona, and
STATE OF ARIZONA; CHESTER FULLER
and MAXINE FULLER, Husband and Wife,
et al.,

Defendants.

COMPLAINT

1. This is an action of a civil nature brought by the United States of America at the request of James H. Douglas, Under Secretary of the Air Force of the United States of America, for the taking of property under power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.

2. The authority for the taking is the Act of Congress approved February 26, 1931, (46 Stat. 1421, 40 U.S.C. 258a) and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 1, 1888, (25 Stat. 357, 40 U.S.C. 257); the Act of Congress approved August 18, 1890, (26 Stat. 316) as amended by the Acts of Congress approved July 2, 1917, (40 Stat. 241) and April 11, 1918, (40

Stat. 518, 50 U.S.C. 171), which acts authorize the acquisition of land for military purposes; the Act of Congress approved August 12, 1935, (49 Stat. 610, 611; 10 U.S.C. 1343a, b and c), which Act authorized the acquisition of land for Air Force Stations and Depots; the National Security Act of 1947 approved July 26, 1947, (61 Stat. 495); the Act of Congress approved July 14, 1952, (Public Law 534, 82nd Congress), which Act authorized acquisition of the land, and the Act of Congress approved July 15, 1952, (Public Law 547, 82nd Congress), which Act appropriated funds for such purposes.

3. The use for which the property is to be taken is for military purposes.

4. The interest in the property to be acquired is fee simple title thereto, subject, however, to existing easements for public roads and highways, public utilities, railroads and pipe lines.

5. The property so to be taken is described in the Exhibit A hereto attached.

6. The persons having or claiming an interest in the property, whose names are ascertainable by a reasonable diligent search of the records and those whose names have otherwise been learned are:

As to Tract No. 111, Chester Fuller and Maxine Fuller, husband and wife, and General American Life Insurance Company, a Missouri corporation.

As to Tract No. 112, E. L. Jarnagin and Erma Jane Jarnagin, husband and wife.

As to Tract No. 113, Goodyear Farms, an Arizona corporation, Ray M. Lorette and Cleo M. Lorette, husband and wife, and Adaman Mutual Water Company, an Arizona non-profit corporation.

As to Tract No. 114, Goodyear Farms, an Arizona corporation, Arthur E. Baker and Doris M. Baker, husband and wife, and Adaman Mutual Water Company, an Arizona non-profit corporation.

As to Tract No. 115, Goodyear Farms, an Arizona corporation, John L. Roach and Bettie Jo Roach, husband and wife, and Adaman Mutual Water Company, an Arizona non-profit corporation.

As to Tract No. 116, Joseph F. Bulfer, Jr., and Mary Bulfer, husband and wife, Goodyear Farms, an Arizona corporation, and Adaman Mutual Water Company, an Arizona non-profit corporation.

As to Tract No. 117, Goodyear Farms, an Arizona corporation, Ralph Ashby and Grace Ashby, husband and wife, and Adaman Mutual Water Company, an Arizona non-profit corporation.

As to Tract No. 118, Goodyear Farms, an Arizona corporation, Bill W. Mullins, and Adaman Mutual Water Company, an Arizona non-profit corporation.

As to Tract No. 119, Adaman Mutual Water Company, an Arizona non-profit corporation.

As to Tract No. 120, Adaman Mutual Water Company, an Arizona non-profit corporation.

7. The State of Arizona, a Body Politic, may have or claim an interest in the property by reason of taxes and assessments due and exigible.

8. In addition to the persons named, there are or may be others who have or may claim some interest in the property to be taken, whose names are unknown to plaintiff and such persons are made parties to the action under the designation "Unknown Owners."

Wherefore, the plaintiff demands judgment that the property be condemned and that just compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

/s/ JACK D. H. HAYS,
United States Attorney.

Trial by jury of the issue of just compensation is demanded by plaintiff.

EXHIBIT A

Tract No. 111

That portion of the Southwest quarter (SW $\frac{1}{4}$) of Section Five (Sec. 5), Township Two North (T2N), Range One West (R1W), Gila and Salt River Meridian, County of Maricopa, State of Arizona, described as follows, basis of bearings being transverse Mercator Grid, Central Zone, Arizona:

Beginning at a point in the South line of said Section 5 distant South 89° 02' 55" East 1724.70 feet

from the Southwest corner of said Section; thence North $42^{\circ} 48' 58''$ East 1242.74 feet to the East line of said Southwest $\frac{1}{4}$; thence along said East line South $2^{\circ} 48' 55''$ East 927.50 feet to the Southeast corner of said Southwest $\frac{1}{4}$; thence North $89^{\circ} 02' 55''$ West 890.31 feet, more or less, to the point of beginning.

Containing 9.46 acres, more or less.

Tract No. 112—Parcel B

That portion of the North half of the Northwest quarter ($N\frac{1}{2}NW\frac{1}{4}$) of Section Seventeen (Sec. 17), Township Two North (T2N), Range One West (R1W), Gila and Salt River Meridian, County of Maricopa, State of Arizona, described as follows, basis of bearings being transverse Mercator Grid, Central Zone, Arizona:

Beginning at the Northwest corner of said Section 17; thence along the North line of said Section South $89^{\circ} 59' 17''$ East 977.72 feet; thence South $42^{\circ} 48' 58''$ West 1438.57 feet, more or less, to the West line of said Section 17, thence North along said West line 1055.45 feet, more or less, to the point of beginning.

Containing 11.84 acres, more or less, including 0.79 acre, more or less, in Street.

Tract No. 113

That portion of the South half of the Northeast quarter ($S\frac{1}{2}NE\frac{1}{4}$) of Section Seven (Sec. 7),

Township Two North (T2N), Range One West (R1W), Gila and Salt River Meridian, in the County of Maricopa, State of Arizona, described as follows, basis of bearings being transverse Mercator Grid, Central Zone, Arizona:

Beginning at the East $\frac{1}{4}$ corner of said Section 7; thence along the East line of said Section North $0^{\circ} 01' 46''$ East 753.11 feet; thence South $42^{\circ} 48' 58''$ West 1019.98 feet, more or less, to the South line of said Northeast $\frac{1}{4}$ of Section 7; thence along said South line South $89^{\circ} 35' 37''$ East 692.86 feet, more or less, to the point of beginning.

Excepting all of that certain strip of land, approximately 45 feet wide, designated as a drainage ditch and more particularly described in a quitclaim deed from Goodyear Farms to Adaman Mutual Water Company, recorded August 4, 1953, in Docket 1180, page 528, in the office of the County Recorder of said County, lying within the boundaries of the above-described land.

Containing 5.27 acres, more or less, including 0.55 acre, more or less, in Street.

Tract No. 114

That portion of the North half of the Southeast quarter ($N\frac{1}{2}SE\frac{1}{4}$) of Section Seven (Sec. 7), Township Two North (T2N), Range One West (R1W), Gila and Salt River Meridian, County of Maricopa, State of Arizona, described as follows, basis of bearings being transverse Mercator Grid, Central Zone, Arizona:

Beginning at the Southeast corner of said North $\frac{1}{2}$ of the Southeast $\frac{1}{4}$ of Section 7; thence along the East line of said Section 7 North $0^{\circ} 01' 05''$ East 1321.79 feet to the East $\frac{1}{4}$ corner of said Section 7; thence along the North line of said Southeast $\frac{1}{4}$ of Section 7 North $89^{\circ} 35' 37''$ West 692.86 feet to a line which bears South $42^{\circ} 48' 58''$ West from a point distant North $0^{\circ} 01' 46''$ East 753.11 feet along the East line of said Section 7 from the said East $\frac{1}{4}$ corner of Section 7; thence Southwesterly along the said line bearing South $42^{\circ} 48' 58''$ West, a distance of 1780.64 feet, more or less, to the South line of said North $\frac{1}{2}$ of the Southeast $\frac{1}{4}$; thence along said South line South $89^{\circ} 22' 54''$ East 1902.76 feet, more or less, to the point of beginning.

Excepting all of that certain strip of land, approximately 45 feet wide, designated as a drainage ditch and more particularly described in a quitclaim deed from Goodyear Farms to Adaman Mutual Water Company, recorded August 4, 1953, in Docket 1180, page 528, in the office of the County Recorder of said County, lying within the boundaries of the above-described land.

Containing 37.95 acres, more or less, including 1.00 acre, more or less, in Street.

Tract No. 115

The South half of the Southeast quarter ($S\frac{1}{2}SE\frac{1}{4}$) of Section Seven (Sec. 7), Township Two North (T2N), Range One West (R1W), Gila

and Salt River Meridian, County of Maricopa, State of Arizona.

Excepting all of that certain strip of land, approximately 45 feet wide, designated as a drainage ditch, and more particularly described in a quitclaim deed from Goodyear Farms to Adaman Mutual Water Company, recorded August 4, 1953, in Docket 1180, page 528, in the office of the County Recorder of said County, lying within the boundaries of the above-described land.

Containing 78.64 acres, more or less, including 3.94 acres, more or less in Street.

Tract No. 116

The North half of the Northeast quarter ($N\frac{1}{2}NE\frac{1}{4}$) of Section Eighteen (Sec. 18), Township Two North (T2N), Range One West (R1W), Gila and Salt River Meridian, in the County of Maricopa, State of Arizona.

Excepting all of that certain strip of land approximately 45 feet wide, designated as a drainage ditch and more particularly described in a quitclaim deed from Goodyear Farms to Adaman Mutual Water Company, recorded August 4, 1953, in Docket 1180, page 528, in the office of the County Recorder of said County, lying within the boundaries of the above-described land.

Also excepting that certain parcel of land known as Well Site 18-C and described in said quitclaim deed as follows:

Commencing at the North $\frac{1}{4}$ corner of said Section 18, thence East (assumed bearing) a distance of 33.0 feet to a point; thence South and parallel to the mid-section line of said section, a distance of 33.0 feet to the true point of beginning; thence continuing South on the same line a distance of 35.0 feet; thence East and parallel to the North line of said section, a distance of 67.0 feet; thence North and parallel to said mid-section line, a distance of 35.0 feet; thence West and parallel to the North line of said section, a distance of 67.0 feet to the true point of beginning.

Containing 78.59 acres, more or less, including 3.95 acres, more or less, in Streets.

Tract No. 117

That portion of the South half of the Southwest quarter ($S\frac{1}{2}SW\frac{1}{4}$) of Section Seven (Sec. 7), Township Two North (T2N), Range One West (R1W), Gila and Salt River Meridian, Maricopa County, State of Arizona, described as follows, basis of bearings being transverse Mercator Grid, Central Zone, Arizona:

Beginning at the South $\frac{1}{4}$ corner of said Section 7; thence along the East line of said Southwest $\frac{1}{4}$ of Section 7 North $0^{\circ} 00' 18''$ East 509.38 feet, more or less, to a line which bears South $42^{\circ} 48' 58''$ West from a point in the East line of said Section 7, said point being distant North $0^{\circ} 01' 46''$ East 753.11 feet from the East $\frac{1}{4}$ corner of said Section; thence Southwesterly along the said line bearing South

42° 48' 58" West, a distance of 694.41 feet, more or less, to the South line of said Section 7; thence along said South line East 471.92 feet, more or less, to the point of beginning.

Containing 2.76 acres, more or less, including 0.70 acre, more or less, in Streets.

Tract No. 118

That portion of the Northeast quarter of the Northwest quarter (NE $\frac{1}{4}$ NW $\frac{1}{4}$) of Section Eighteen (Sec. 18), Township Two North (T2N), Range One West (R1W), Gila and Salt River Meridian, County of Maricopa, State of Arizona, described as follows, basis of bearings being transverse Mercator Grid, Central Zone, Arizona:

Beginning at the North $\frac{1}{4}$ corner of said Section 18; thence along the North line of said Section West 471.92 feet, more or less, to a line which bears South 42° 48' 58" West from a point in the East line of Section 7 of said Township and Range, said point being distant North 0° 01' 46" East 753.11 feet from the East $\frac{1}{4}$ corner of said Section 7; thence Southwesterly along the said line bearing South 42° 48' 58" West, a distance of 375.03 feet, more or less, to a point distant South 42° 48' 58" West 4953.45 feet from said point in the East line of Section 7; thence South 47° 11' 02" East 990.82 feet, more or less, to the East line of said Northwest $\frac{1}{4}$ of Section 18; thence along said East line North 948.51 feet, more or less, to the point of beginning.

Containing 9.40 acres, more or less, including 1.05 acres, more or less, in Streets.

Tract No. 119

That certain parcel of land known as Well Site 18-C located in the Northwest quarter of the Northeast quarter (NW $\frac{1}{4}$ NE $\frac{1}{4}$) of Section Eighteen (Sec. 18), Township Two North (T2N), Range One West (R1W), Gila and Salt River Meridian, in the County of Maricopa, State of Arizona, more particularly described as follows:

Commencing at the North $\frac{1}{4}$ corner of said Section 18; thence East (assumed bearing) a distance of 33.0 feet to a point; thence South and parallel to the mid-section line of said section, a distance of 33.0 feet to the true point of beginning; thence continuing South on same line a distance of 35.0 feet; thence East and parallel to the North line of said section, a distance of 67.0 feet; thence North and parallel to said mid-section line, a distance of 35.0 feet; thence West and parallel to the North line of said section, a distance of 67.0 feet to the true point of beginning.

Containing 0.05 acre, more or less.

Tract No. 120

A strip of land described approximately as the West 45 feet of the East 78 feet of Sections Seven and Eighteen (Secs. 7 and 18) in Township Two North (T2N), Range One West (R1W), Gila and Salt River Meridian, in the County of Maricopa,

State of Arizona, said strip of land being a portion of that certain parcel of land designated as a drainage ditch and more particularly described in a quitclaim deed from Goodyear Farms to Adaman Mutual Water Company, recorded August 4, 1953, in Docket 1180, page 528 in the office of the County Recorder of said County.

Except that portion of said certain parcel of land lying Southerly and Westerly of the South line of the North $\frac{1}{2}$ of the Northeast $\frac{1}{4}$ of said Section 18.

Also except that portion of said certain parcel of land lying Northerly and Westerly of a line bearing South $42^{\circ} 48' 58''$ West from a point in the East line of said Section 7, said point being distant North $0^{\circ} 01' 46''$ East 753.11 feet from the East $\frac{1}{4}$ corner of said Section 7.

Containing 4.81 acres, more or less.

[Endorsed]: Filed November 27, 1953.

[Title of District Court and Cause.]

DECLARATION OF TAKING

To the Honorable

The United States District Court:

I, the undersigned, James H. Douglas, Under Secretary of the Air Force of the United States of America, do hereby make the following declaration by direction of the Secretary of the Air Force:

1. (a) The lands hereinafter described are taken under and in accordance with the Act of Congress approved February 26, 1931, (46 Stat. 1421, 40 U.S.C. 258a) and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 1, 1888, (25 Stat. 357, 40 U.S.C. 257); the Act of Congress approved August 18, 1890, (26 Stat. 316) as amended by the Acts of Congress approved July 2, 1917, (40 Stat. 241) and April 11, 1918, (40 Stat. 518, 50 U.S.C. 171), which acts authorize the acquisition of land for military purposes; the Act of Congress approved August 12, 1935, (49 Stat. 610, 611; 10 U.S.C. 1343a, b and c), which Act authorized the acquisition of land for Air Force Stations and Depots; the National Security Act of 1947 approved July 26, 1947, (61 Stat. 495); the Act of Congress approved July 14, 1952, (Public Law 534, 82nd Congress), which Act authorizes acquisition of the land, and the Act of Congress approved July 15, 1952, (Public Law 547, 82nd Congress), which Act appropriated funds for such purposes.

(b) The public uses for which said lands are taken are as follows: The said lands are necessary adequately to provide for expanding needs and requirements of the Department of the Air Force and for other military uses incident thereto. The lands have been selected under the direction of the Secretary of the Air Force for acquisition by the United States for use in connection with Luke Air

Force Base, Maricopa County, State of Arizona, and for such other uses as may be authorized by Congress or by Executive Order.

2. A general description of the lands being taken is set forth in Schedule "A," attached hereto and made a part hereof, and is a description of the same lands described in the complaint in condemnation in the above-entitled cause.

3. The estate taken for said public uses is fee simple title thereto, subject, however, to existing easements for public roads and highways, public utilities, railroads and pipe lines.

4. A plan showing the lands taken is annexed hereto as Schedule "B" and made a part hereof.

5. The sum estimated by the undersigned as just compensation for the said lands with all buildings and improvements thereon and all appurtenances thereto and including any and all interests hereby taken in said lands is set forth in Schedule "A" herein, which sum the undersigned causes to be deposited herewith in the registry of the court for the use and benefit of the persons entitled thereto. The undersigned is of the opinion that the ultimate award for said lands probably will be within any limits prescribed by law on the price to be paid therefor.

In Witness Whereof, the undersigned, the Under Secretary of the Air Force, hereunto subscribes his name by direction of the Secretary of the Air Force,

this 16th day of November, A.D. 1953, in the City of Washington, District of Columbia.

/s/ JAMES H. DOUGLAS,

Under Secretary of the Air
Force.

[Endorsed]: Filed November 27, 1953.

[Title of District Court and Cause.]

MOTION FOR ORDER FOR DELIVERY
OF POSSESSION

Plaintiff moves the Court for an order requiring all defendants to this action and any and all persons in possession or control of the property described in the Complaint filed herein to surrender possession of the said property, to the extent of the estate to be condemned, to plaintiff on or before December 1, 1953, and as grounds therefor plaintiff states:

1. James H. Douglas, Under Secretary of the Air Force of the United States of America, has found and determined that it is necessary and advantageous to the interests of plaintiff to acquire such possession.

2. Plaintiff is entitled to such possession as a matter of right.

UNITED STATES OF
AMERICA,

/s/ JACK D. H. HAYS,

U. S. District Attorney for
the District of Arizona.

[Endorsed]: Filed November 27, 1953.

[Title of District Court and Cause.]

ORDER FOR DELIVERY OF POSSESSION

This action coming on for hearing (ex parte) upon motion of plaintiff for an order for the surrender of possession of the property described in the Complaint filed herein to plaintiff, and it appearing that plaintiff is entitled to possession of said property,

It is this 28th day of November, 1953, adjudged that all defendants to this action and all persons in possession or control of the property described in the Complaint filed herein shall surrender possession of the said property, to the extent of the estate being condemned, to plaintiff on or before December 1, 1953; provided that a copy of this order shall be served upon all persons in possession or control of the said property forthwith.

It is further adjudged that the right to harvest existing crops on Tracts 112B, 116, 119, and that portion of Tract 120 in Section 18, Township 2 North, Range 1 West, Gila and Salt River Meridian, on or before January 15, 1954, is reserved to the respective owners thereof.

Enter:

/s/ DAVE W. LING,

United States District Judge.

[Endorsed]: Filed November 27, 1953.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between the United States of America, hereinafter called the plaintiff, and Chester Fuller and Maxine Fuller, husband and wife, hereinafter called the defendants, that:

Whereas, action in condemnation was commenced in the above Court on November 27, 1953, by the filing of a declaration of taking and a complaint in condemnation on behalf of the United States of America at the request of the Under Secretary of the Air Force, and

Whereas, the defendants were the owners in fee simple title to the following described parcel of real estate:

Tract No. 111

That portion of the Southwest quarter (SW $\frac{1}{4}$) of Section Five (Sec. 5), Township Two North (T2N), Range One West (R1W), Gila and Salt River Meridian, County of Maricopa, State of Arizona, described as follows, basis of bearings being transverse Mercator Grid, Central Zone, Arizona:

Beginning at a point in the South line of said Section 5 distant South $89^{\circ} 02' 55''$ East 1724.70 feet from the Southwest corner of said Section; thence North $42^{\circ} 48' 58''$ East 1242.74 feet to the East line of said Southwest $\frac{1}{4}$; thence along said East line South $2^{\circ} 48' 55''$ East 927.50 feet to the

Southeast corner of said Southwest $\frac{1}{4}$; thence North $89^{\circ} 02' 55''$ West 890.31 feet, more or less, to the point of beginning.

Containing 9.46 acres, more or less.

Unofficially known as Tract No. 111.

and under the provisions of the Declaration of Taking Act (46 Stat. 1421) the title to the lands above described in fee simple, subject to existing easements for public roads and highways, public utilities, railroads and pipelines, vested in the United States of America, and the right to just compensation for the same was likewise, under the provisions of said Act, vested in the persons entitled thereto, and

Whereas, Chester Fuller and Maxine Fuller, husband and wife, were the owners in fee simple of the land hereinabove described.

Now, Therefore, it is hereby stipulated and agreed by and between the above-named parties that the sum of Nine Thousand Nine Hundred (\$9,900.00) Dollars, inclusive of interest is the just compensation in full to be paid by the plaintiff for the taking and condemnation of the unencumbered fee simple title to the lands hereinbefore described, subject only to such easements as may be or have been waived by plaintiff, together with all improvements thereunto belonging, including damage, if any, to any remaining land owned by the defendants.

It is further stipulated and agreed by and between the above-named parties that the aforesaid

sum shall be paid to Chester Fuller and Maxine Fuller, husband and wife, and that from said sum there shall first be paid any and all liens, taxes and encumbrances against said land, including adverse claims or claims by lessees.

The defendants, Chester Fuller and Maxine Fuller, husband and wife, hereby enter their appearance in this action and expressly waive service of summons, petition and any and all other process and all right to a hearing on the petition and pleadings filed in this action and the right to the appointment of Commissioners or Jury for the determination of just compensation.

The above-named parties hereby agree to the entering of a judgment in conformity with this stipulation, fixing the value of the land hereinbefore described as recited herein, and setting forth the conditions and provisions of this stipulation.

Executed on the 29th day of January, 1954.

/s/ CHESTER FULLER,

/s/ MAXINE FULLER,

Defendants.

UNITED STATES OF
AMERICA,

JACK D. H. HAYS,

United States Attorney;

/s/ EVERETT L. GORDON,

Asst. United States Attorney.

[Endorsed]: Filed Feb. 18, 1954.

[Title of District Court and Cause.]

JUDGMENT IN RE TRACT No. 111

This cause coming on regularly to be heard before the Court this 18th day of February, 1954, upon the stipulation between the defendants Chester Fuller and Maxine Fuller, husband and wife, and the plaintiff, United States of America, and

It appearing to the Court that the sum of Nine Thousand Nine Hundred (\$9,900.00) Dollars has been deposited in the registry of this Court as estimated just compensation for the following-described real estate:

That portion of the Southwest quarter (SW $\frac{1}{4}$) of Section Five (Sec. 5), Township Two North (T2N), Range One West (R1W), Gila and Salt River Meridian, County of Maricopa, State of Arizona, described as follows, basis of bearings being transverse Mercator Grid, Central Zone, Arizona:

Beginning at a point in the South line of said Section 5 distant South $89^{\circ} 02' 55''$ East 1724.70 feet from the Southwest corner of said Section; thence North $42^{\circ} 48' 58''$ East 1242.74 feet to the East line of said Southwest $\frac{1}{4}$; thence along said East line South $2^{\circ} 48' 55''$ East 927.50 feet to the Southeast corner of said Southwest $\frac{1}{4}$; thence North $89^{\circ} 02' 55''$ West 890.31 feet, more or less, to the point of beginning.

Containing 9.46 acres, more or less.

It Is Ordered, Adjudged and Decreed that the reasonable just compensation for the taking of the unencumbered fee simple title to the lands hereinabove described is the sum of Nine Thousand Nine Hundred (\$9,900.00) Dollars, inclusive of interest, and that title in fee simple to said lands is now vested in the United States of America, and is hereby confirmed and held to be in the United States of America.

It Is Further Ordered, Adjudged and Decreed that the sum of Eight Thousand Four Hundred Fifteen (\$8,415.00) Dollars has been paid to said defendants pursuant to order entered herein on January 11, 1954; that the Clerk of this Court be, and he is hereby directed to disburse the remaining funds on deposit as estimated just compensation for the taking of said real estate, and that he make such distribution by making his check payable to Chester Fuller and Maxine Fuller in the sum of One Thousand Four Hundred Eighty-five (\$1,485.00) Dollars, and deliver same to them by means of mailing same to them at Route 1, Litchfield Park, Arizona.

/s/ DAVE W. LING,
Judge, United States District Court for the District
of Arizona.

[Endorsed]: Filed Feb. 18, 1954.

[Title of District Court and Cause.]

AMENDMENT TO DECLARATION
OF TAKING

To the Honorable

The United States District Court:

I, the undersigned, James H. Douglas, Under Secretary of the Air Force of the United States of America, by the direction of the Secretary of the Air Force, and in accordance with authority contained in the Acts of Congress previously set forth in the Declaration of Taking filed in the above-entitled cause on, to wit, November 27, 1953, do hereby amend said declaration of taking in the following manner and in these particulars only:

1. Delete the sum estimated to be just compensation for the estate taken in Tract No. 112-Parcel B, on page 2 of Schedule "A" of said Declaration of Taking, to wit:

"Eight Thousand Four Hundred Eighty Dollars (\$8,480.00)."

And, insert in lieu thereof

"Nine Thousand Five Hundred Sixty-six and no/100 Dollars (\$9,566.00)."

2. Delete the sum estimated to be just compensation for the estate taken in Tract No. 114 on page 4 of Schedule "A" of said Declaration of Taking, to wit:

“Thirty Thousand One Hundred Forty and no/100 Dollars (\$30,140.00).”

And, insert in lieu thereof

“Thirty-four Thousand Six Hundred Ten and no/100 Dollars (\$34,610.00).”

3. Delete the sum estimated to be just compensation for the estate taken in Tract No. 115 on page 4 of Schedule “A” of said Declaration of Taking, to wit:

“Forty-nine Thousand Seven Hundred Fifty and no/100 Dollars (\$49,750.00).”

And, insert in lieu thereof

“Fifty-one Thousand and Ten and no/100 Dollars (\$51,010.00).”

4. Delete the sum estimated to be just compensation for the estate taken in Tract No. 116 on page 5 of Schedule “A” of said Declaration of Taking to wit:

“Fifty-one Thousand and no/100 Dollars (\$51,000.00).”

And, insert in lieu thereof

“Fifty-two Thousand Three Hundred Seventy and no/100 Dollars (\$52,370.00).”

5. Delete the gross sum estimated to be just compensation for the estate in the lands hereby taken as set forth on page 8 of Schedule “A” of said Declaration of Taking, to wit:

“One Hundred Sixty-eight Thousand One Hundred Five and no/100 Dollars (\$168,-105.00).”

And, insert in lieu thereof

“One Hundred Seventy-six Thousand Two Hundred Ninety-one and no/100 Dollars (\$176,-291.00).”

The purpose of this amendment being to increase the estimated compensation to be paid for Tracts Nos. 112-Parcel B, 114, 115 and 116 in the amounts of \$1,086.00, \$4,470.00, \$1,260.00 and \$1,370.00, respectively.

In Witness Whereof, the undersigned, the Under Secretary of the Air Force, hereunto subscribes his name by direction of the Secretary of the Air Force, this 22nd day of May, A.D. 1954, in the City of Washington, District of Columbia.

/s/ JAMES H. DOUGLAS,

Under Secretary of the Air
Force.

[Endorsed]: Filed June 15, 1954.

[Title of District Court and Cause.]

JUDGMENT ON DECLARATION
OF TAKING

The above-entitled cause coming on to be heard upon the motion of the plaintiff, the United States

of America, for judgment on the Declaration of Taking filed in the above-entitled cause on the 27th day of November, 1953, and the Amendment to said Declaration of Taking filed in the above-entitled cause on June 15, 1954, by James H. Douglas, Under Secretary of the Air Force of the United States; and upon consideration of said motion, the condemnation complaint filed herein, the Declaration of Taking, the Amendment to the Declaration of Taking, the statutes in such cases made and provided, and it appearing to the satisfaction of the Court:

First: That the United States of America is entitled to acquire property by eminent domain for the purposes as set out and prayed in said Complaint;

Second: That a Complaint in condemnation was filed at the request of the Under Secretary of the Air Force of the United States and under authority of the Attorney General of the United States;

Third: That the Complaint and Declaration of Taking state the authority under which, and the public use for which said lands are taken, and that the Under Secretary of the Air Force of the United States is the person duly authorized and empowered by law to acquire lands such as are described in the Complaint for the purposes therein set forth, as authorized by law, and that the Attorney General of the United States is the person authorized by law to direct the institution of such condemnation proceedings;

Fourth: That a proper description of the land sought to be taken, sufficient for identification thereof, is set out in said Declaration of Taking and a plat showing the said land is incorporated in said Declaration of Taking;

Fifth: That said Declaration of Taking contains a statement that plaintiff is taking the full fee simple title to Tracts Nos. 111 and 112B to 120, both inclusive, more particularly described in Exhibit A hereto attached and by this reference made a part hereof; said takings are for use in connection with Luke Air Force Base to adequately provide for the expanding needs and requirements of the Department of the Air Force and for such other uses as may be authorized by Congress or by Executive Order;

Sixth: That a statement is contained in said Declaration of Taking and in the Amendment to said Declaration of Taking of the sum of money, estimated by the Under Secretary of the Air Force of the United States to be just compensation for the full fee simple title to the tracts of land taken as follows:

Tract No. 111.....	\$ 9,900.00
Tract No. 112B.....	9,566.00
Tract No. 113.....	5,050.00
Tract No. 114.....	34,610.00
Tract No. 115.....	51,010.00
Tract No. 116.....	52,370.00
Tract No. 117.....	2,965.00
Tract No. 118.....	8,370.00

Tract No. 119.....	50.00
Tract No. 120.....	2,400.00

and said sums have been deposited in the Registry of this Court for the use of the persons entitled thereto, upon and at the time of the filing of said Declaration of Taking;

Seventh: That a statement is contained in said Declaration of Taking that the amount of the ultimate award of compensation for the estate in said land, in the opinion of the Under Secretary of the Air Force of the United States, will probably be within any limits prescribed by law on the price to be paid therefor.

It Is, Therefore, Ordered, Adjudged and Decreed that the full fee simple title, subject to existing easements for public roads and highways, public utilities, railroads and pipe lines, to the lands described in Exhibit A hereto attached for use in connection with Luke Air Force Base to adequately provide for the expanding needs and requirements of the Department of the Air Force and for such other uses as may be authorized by Congress or by Executive Order, be vested in the United States of America upon the filing of said Declaration of Taking and the depositing in the Registry of this Court the sums of money hereinbefore recited in Paragraph Sixth, and said full fee simple title to the said lands is deemed to have been condemned and taken for the use of the United States of America, and the right to just compensation for said full fee simple title, upon the filing of the Declaration of

Taking and the amount of said deposit, vested in the persons entitled thereto, and the amount of compensation shall be ascertained and awarded in this proceeding and established by judgment herein pursuant to law; and

That the United States of America is entitled to the immediate possession of the above-described full fee simple title to the lands described in Exhibit A hereto attached, and that the United States of America and its agents are hereby authorized to enter upon said premises and take full and complete possession thereof to the extent of the interest acquired, and this cause is held open for such other and further orders, judgments and decrees as may be necessary in the premises, and

It is Further Ordered, Adjudged and Decreed that the United States Marshal be, and he is hereby directed and instructed forthwith to serve a certified copy of this Judgment upon any of the defendants now in possession of said premises or any part thereof, or if no such defendants are found in actual possession of said premises, then he is ordered to post such certified copies at a conspicuous place upon said premises and forthwith make due return of said service to this Court.

Done in Open Court this 15th day of June, 1954.

/s/ DAVE W. LING,

Judge, United States District Court for the District
of Arizona.

[Endorsed]: Filed June 15, 1954.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between the United States of America, hereinafter called the plaintiff, and E. L. Jarnagin and Erma Jane Jarnagin, husband and wife, hereinafter called the defendants, that:

Whereas, action in condemnation was commenced in the above Court on November 27, 1953, by the filing of a declaration of taking and a complaint in condemnation on behalf of the United States of America at the request of the Under Secretary of the Air Force, and

Whereas, the defendants, E. L. Jarnagin and Erma Jane Jarnagin, husband and wife, were the owners in fee simple title of the following described parcel of real estate:

Tract 112 (Parcel B)

That portion of the North half of the Northwest quarter ($N\frac{1}{2}NW\frac{1}{4}$) of Section Seventeen (Sec. 17), Township Two North (T2N), Range One West (R1W), Gila and Salt River Meridian, County of Maricopa, State of Arizona, described as follows, basis of bearings being transverse Mercator Grid, Central Zone, Arizona:

Beginning at the Northwest corner of said Section 17; thence along the North line of said Section

South 89° 59' 17" East 977.72 feet; thence South 42° 48' 58" West 1438.57 feet, more or less, to the West line of said Section 17; thence North along said West line 1055.45 feet, more or less, to the point of beginning.

Containing 11.84 acres, more or less, including 0.79 acre, more or less, in Street, and under the provisions of the Declaration of Taking Act (46 Stat. 1421) the title to the lands above described in fee simple, subject to existing easements for public roads and highways, public utilities, railroads and pipe lines, vested in the United States of America, and the right to just compensation for the same was likewise, under the provisions of said Act, vested in the persons entitled thereto, and

Now, Therefore, it is hereby stipulated and agreed by and between the above-named parties that the sum of Nine Thousand Five Hundred Sixty-Six and No/100 (\$9,566.00) Dollars inclusive of interest is the gross sum to be paid to said defendants, and is the just compensation in full to be paid by the plaintiff for the taking and condemnation of the unencumbered fee simple title to the lands hereinbefore described, together with all improvements thereunto belonging in the sum of Six Thousand Eighty and No/100 (\$6,080.00) Dollars, and includes the sum of Three Hundred Sixty and No/100 (\$360.00) Dollars as damage to remaining crops, and includes the sum of Two Thousand Four Hundred and No/100 (\$2,400.00) Dollars as severance damage to the remaining land owned by the

defendants, and includes the sum of Seven Hundred Twenty-six and No/100 (\$726.00) Dollars as the amount acceptable in lieu of plaintiff constructing a relocated ditch, subject only to such easements as may be or have been waived by plaintiff.

It is further stipulated and agreed by and between the above-named parties that the aforesaid sum shall be paid to E. L. Jarnagin and Erma Jane Jarnagin, husband and wife, and that from said sum there shall first be paid any and all liens, balance due on taxes and encumbrances against said land, including adverse claims or claims by lessees.

The defendants, E. L. Jarnagin and Erma Jane Jarnagin, husband and wife, hereby enter their appearance in this action and expressly waive service of summons, petition and any and all other process and all right to a hearing on the petition and pleadings filed in this action and the right to the appointment of Commissioners or Jury for the determination of just compensation.

The above-named parties hereby agree to the entering of a judgment in conformity with this stipulation, fixing the value of the land hereinbefore described as recited herein, and setting forth the conditions and provisions of this stipulation.

Executed on the 5th day of May, 1954.

/s/ E. L. JARNAGIN,

/s/ ERMA JANE JARNAGIN,

Defendants.

UNITED STATES OF
AMERICA,JACK D. H. HAYS,
United States Attorney,/s/ EVERETT L. GORDON,
Assistant United States
Attorney.

[Endorsed]: Filed July 2, 1954.

[Title of District Court and Cause.]JUDGMENT IN RE TRACT 112
(PARCEL B)

This cause coming on regularly to be heard before the Court this 2nd day of July, 1954, upon the Stipulation between the defendants E. L. Jarnagin and Erma Jane Jarnagin, husband and wife, and the plaintiff, United States of America, and

It appearing to the Court that the sum of \$9,566.00 has been deposited in the registry of this Court as estimated just compensation for the following described real estate:

Tract No. 112—Parcel B

That portion of the North Half of the Northwest Quarter ($N\frac{1}{2}NW\frac{1}{4}$) of Section Seventeen (Sec. 17), Township Two North (T2N), Range One West (R1W), Gila and Salt River Meridian, County of Maricopa, State of Arizona, described as follows, basis of bearings

being transverse Mercator Grid, Central Zone, Arizona:

Beginning at the Northwest corner of said Section 17; thence along the North line of said Section South $89^{\circ} 59' 17''$ East 977.72 feet; thence South $42^{\circ} 48' 58''$ West 1438.57 feet, more or less, to the West line of said Section 17; thence North along said West line 1055.45 feet, more or less, to the point of beginning.

Containing 11.84 acres, more or less, including 0.79 acre, more or less, in Street.

It Is Ordered, Adjudged and Decreed that the reasonable just compensation for the taking of the unencumbered fee simple title to the lands hereinabove described is the sum of \$9,566.00, inclusive of interest, and that title in fee simple to said lands is now vested in the United States of America, and is hereby confirmed and held to be in the United States of America.

It Is Further Ordered, Adjudged and Decreed that said sum having been paid to said defendants pursuant to the order of this Court entered herein on June 18, 1954, that the award and judgment rendered in favor of said defendants be, and the same is fully discharged, paid and satisfied.

Done in Open Court this 2nd day of July, 1954.

/s/ DAVE W. LING,

Judge, United States District Court, for the District of Arizona.

[Endorsed]: Filed July 2, 1954.

[Title of District Court and Cause.]

MOTION FOR INTERVENTION

Comes now the following named Arizona Corporations and residents of Maricopa County, Arizona:

1. Adaman Mutual Water Company, an Arizona Non-Profit Corporation, on behalf of itself as a water company and owner of fee lands within the Adaman Reclamation Project, and on behalf of its stockholders as their interests may appear;

2. All other fee owners, contract purchasers and lessees of lands within the Adaman Reclamation Project being:

Goodyear Farms, an Arizona Corporation;
Harry A. Kandarian and Bernita Kandarian, husband and wife;

Peter Nalbandian, as his sole and separate property;

Joseph E. Bulfer and Mary Bulfer, husband and wife;

Calvin F. Jones and Margaret Jones, husband and wife;

Jonathan Thomas Rogers, a single man;

Jefferson Z. Rogers, a married man;

John Newton Edge and Margaret Elizabeth Edge, husband and wife;

Harold Ralph Hunt and Georgia May Hunt, husband and wife;

George Reismann and Joanna Reismann, husband and wife;

Lee Weldon Merritt and Peggy Childers Merritt, husband and wife;

Raymond F. Austerman and Zula Austerman, husband and wife;

John A. Sellers and Maxine Sellers, husband and wife;

Marshall E. Manley and Mary Elizabeth Manley, husband and wife;

Myron M. Mitchell and Irene Mitchell, husband and wife;

Henry Hallam Hestand and Martha Sue Hestand, husband and wife;

Chester Elwood Hunt and Mary Virginia Hunt; husband and wife;

Olliver Kissling and Peggy Jean Kissling, husband and wife;

Albert C. Lueck and Melva Lueck, husband and wife;

Ralph Ashby and Grace Ashby, husband and wife;

Leon Fort and Doris C. Fort, husband and wife;

Carlton A. Hinton and Verna Hinton, husband and wife;

Roy Sheppard and Dora L. Sheppard, husband and wife;

Herman Eaton and Dorothy Eaton, husband and wife;

J. Elmer Woodward and Bernice Woodward, husband and wife;

Juan Brashears and Betty Brashears, husband and wife;

J. L. Bunger and Kathryn Bunger, husband and wife;

Leon G. Gailey;

Archer W. Seaver;

Ray M. Lorette;

George W. Busey;

B. W. Mullins;

James H. Sharp;

Jewell J. Stone;

by and through their duly authorized attorneys, Snell & Wilmer, and respectfully move this Court to grant and allow the filing of the Petition for Intervention attached hereto for the following reasons:

I.

By and under the above-entitled action the United States of America and the United States Air Force have taken and condemned approximately two hundred thirty-nine (239) acres of land in Maricopa County, Arizona, of which approximately two hundred thirty-three (233) acres are located within the Adaman Reclamation Project, for purposes of extending and improving the runways and facilities of Luke Air Force Base at Litchfield Park, Arizona.

II.

As the direct and natural result of the admitted and acknowledged takings in the action above-described, certain other substantial property and property rights have also been taken, and certain

other property and property rights so seriously diminished and restricted as to amount to a taking, none of which have been included in the above-entitled action, nor has compensation therefor been otherwise made by the said United States of America and United States Air Force.

III.

The result of these unacknowledged and unadmitted takings and damages is that the above named parties are suffering and will suffer substantial loss of property and property rights without compensation therefor unless they are allowed by this Court to become parties to the above-entitled action and thereby given an opportunity to state and prove their claims and the damages and takings they have suffered.

IV.

Intervention in the above-entitled action is both the proper procedure and the only procedure by and under which the above named parties can secure the relief to which they are entitled.

SNELL & WILMER,

By /s/ EDWARD JACOBSON,

Attorney for Above Named
Movants.

Receipt of copy acknowledged.

[Endorsed]: Filed July 24, 1954.

In the United States District Court for the
District of Arizona

No. Civil 1949

UNITED STATES OF AMERICA,

Plaintiff,

vs.

238.77 ACRES OF LAND, More or Less, Situate
in Maricopa County, State of Arizona,
and STATE OF ARIZONA; CHESTER
FULLER and MAXINE FULLER, Husband
and Wife, et al.,

Defendants,

GOODYEAR FARMS, an Arizona Corporation;
ADAMAN MUTUAL WATER COMPANY,
an Arizona Non-Profit Corporation; CARLON
A. HINTON and VERA HINTON, His
Wife; RAYMOND F. AUSTERMAN and
ZULA AUSTERMAN, His Wife, et al.,

Interveners.

PETITION FOR INTERVENTION

Comes now Snell & Wilmer, attorneys for Inter-
veners and for their Petition of Intervention allege
as follows:

I.

On November 27, 1953, the United States of
America filed a Complaint in the above-entitled ac-
tion seeking the condemnation of certain property
therein described; the Secretary of the Air Force

of the United States of America filed a Declaration of Taking, taking these lands alleged to be necessary for use in connection with Luke Air Force Base, Maricopa County, State of Arizona; and, on the same date, an Order for Delivery of Possession of all said lands was entered by this Court directing the possession and control of the said property be surrendered to the United States of America on or before December 1, 1953.

II.

Thereafter, Plaintiff, the United States of America, did take possession of all of the above referred to lands and the Air Force of the United States of America put the same to the use of extending and improving the runways and attendant facilities for Luke Air Force Base, at Litchfield Park, Maricopa County, Arizona, which said extended runways and improved facilities are now in use by the said Air Force of the United States of America.

III.

In the above-entitled action and by the Order for Delivery of Possession therein, the Plaintiff, the United States of America, took approximately two hundred thirty-three (233) acres of land located within the Adaman Reclamation Project (hereinafter called "Project"), which Project contained, before said taking a total of two thousand eight hundred thirty-one (2831) acres, more or less. The remaining two thousand five hundred ninety-eight (2598) acres in the Project are comprised of thirty-nine (39) tracts of land all but one of which has

been and now is being used for residential and/or agricultural purposes. The Project, the location of the lands taken therefrom and of the thirty-nine (39) tracts remaining and the names of the owners, contract purchasers and lessees thereof are more particularly shown on a map attached hereto and made a part hereof by reference as Exhibit 1.

IV.

Said Project has been and is now being served water by the Adaman Mutual Water Company, an Arizona Non-Profit Corporation (hereinafter called "Company"), which Company is owned by the owners of the lands in the Project and which Company, for the purpose of furnishing water to the lands in the Project has drilled wells, constructed ditches, pipelines and installed and maintained pumps, machinery and other facilities for these purposes having invested therefor a capital sum in excess of Three Hundred Seventy Thousand and no/100 (\$370,000.00) Dollars.

V.

The Interveners herein (all natural persons hereinafter listed being residents of Maricopa County, Arizona) are:

a. Adaman Mutual Water Company, an Arizona Non-Profit Corporation, on behalf of itself as a water company and owner of fee lands within the Project, and on behalf of its stockholders as their interest may appear;

b. All other fee owners of lands within the Project being:

Goodyear Farms, an Arizona Corporation;

Harry A. Kandarian and Bernita Kandarian, husband and wife;

Peter Nalbandian, as his sole and separate property;

Joseph E. Bulfer and Mary Bulfer, husband and wife;

Calvin F. Jones and Margaret Jones, husband and wife;

Jonathan Thomas Rogers, a single person;

Jefferson Z. Rogers, a married man;

John Newton Edge and Margaret Elizabeth Edge, husband and wife;

Harold Ralph Hunt and Georgia May Hunt, husband and wife;

George Reismann and Joanna Reismann, husband and wife;

Lee Weldon Merritt and Peggy Childers Merritt, husband and wife;

Raymond F. Austerman and Zula Austerman, husband and wife.

c. All owners of equitable interests (under Contracts of Purchase) in lands within the Project being:

John A. Sellers and Maxine Sellers, husband and wife;

Marshall E. Manley and Mary Elizabeth Manley, husband and wife;

Myron M. Mitchell and Irene Mitchell, husband and wife;

Henry Hallam Hestand and Martha Sue Hestand, husband and wife;

Chester Elwood Hunt and Mary Virginia Hunt, husband and wife;

Olliver Kissling and Peggy Jean Kissling, husband and wife;

Albert C. Lueck and Melva Lueck, husband and wife;

Ralph Ashby and Grace Ashby, husband and wife;

Leon Fort and Doris C. Fort, husband and wife;

Carlton A. Hinton and Verna Hinton, husband and wife;

Roy Sheppard and Dora L. Sheppard, husband and wife;

Herman Eaton and Dorothy Eaton, husband and wife;

J. Elmer Woodward and Bernice Woodward, husband and wife;

Juan Brashears and Betty Brashears, husband and wife;

J. L. Bunger and Kathryn Bunger, husband and wife;

Calvin F. Jones and Margaret P. Jones, husband and wife.

d. All lessees of lands within the Project being:

Leon G. Gailey,

Archer W. Seaver,

Ray M. Lorette,

George W. Busey,
B. W. Mullins,
R. F. Austerman,
James H. Sharp,
Jewell J. Stone.

Intervenors' lands within the Project, the designation as to whether the same are owned in fee, being purchased under contract or being leased and the location of the same are as shown by the tracts numbered one (1) through thirty-nine (39) on the map incorporated herein as Exhibit 1.

The name of the owner, purchaser or lessee, the tract number and the legal description of each such tract of land whether held in fee, being purchased under contract or leased is set forth in Exhibit 2, attached hereto and made a part hereof by reference.

The form of deed under which all Intervenors who are fee owners hold (with certain exceptions hereinafter noted) is that set forth as Exhibit 3, attached hereto and made a part hereof by reference.

The form of deed under which fee owners Joseph E. Bulfer and Mary Bulfer, husband and wife, and Lee Weldon Merritt and Peggy Childers Merritt, husband and wife, hold, is substantially the same as Exhibit 3 except for the fact that it includes, in addition, a mineral reservation clause substantially in the form set forth as Exhibit 4 attached hereto and made a part hereof by reference.

The form of deed by and under which the following named Interveners who are fee owners of Project lands hold title to some or all of their lands, is different from either Exhibit 3 or Exhibit 4. However, in each case, the predecessor in interest to the said fee owners held under deeds the same or similar in form to Exhibit 3, and in no case is the claim for damages of these Interveners as set forth herein increased, diminished or in anywise altered by reason of such variation. These owners are:

Harry A. Kandarian and Bernita J. Kandarian, his wife;

Peter Nalbandian, as his sole and separate property;

Jonathan Thomas Rogers, a single man;

John N. Edge and Margaret Edge, husband and wife;

Harold Ralph Hunt and Georgia May Hunt, husband and wife;

Raymond F. Austerman and Zula Austerman, husband and wife.

The Form of Agreement for Sale under which all Interveners who are contract purchasers hold equitable title to lands within the Project (with certain exceptions hereinafter noted) is set forth in Exhibit 5 attached hereto and made a part hereof by reference.

The Form of Agreement for Sale under which Calvin F. Jones and Margaret P. Jones, husband and wife, and Carlon A. Hinton and Verna Hinton, husband and wife, hold certain of their lands is

different from Exhibit 5. However, in both cases their predecessors in interest held under Agreements for Sale in form set forth as Exhibit 5 and deeds in form set forth in Exhibit 3. And in neither case is the claim for damages of these Interveners as set forth herein increased, diminished or altered by such variation.

The form of Lease under which all Interveners who are Lessees hold leasehold interests in and to lands within the Project (with one exception hereinafter noted) is set forth in Exhibit 6 attached hereto and made a part hereof by reference.

The form of Lease under which Raymond F. Austerman holds a leasehold interest in certain of the lands within the Project is different from Exhibit 6. However, the difference in nowise increases, diminishes or affects his claim for damages as set forth herein.

VI.

This Petition of Intervention is concerned generally with claims for damages for two separate kinds of takings. For convenience and clarity they will hereinafter be sometimes referred to as "Eight Per Cent Taking" and "Aircraft Taking." All fee owners and contract purchasers in the Project are claimants for damages under the "Eight Per Cent Taking." All owners, contract purchasers and lessees in the Project of lands lying generally in the path of jet aircraft flight (being generally the lands in the southern half of the Project) are claimants for damages under "Aircraft Taking."

Eight Per Cent Taking:

VII.

As heretofore alleged, Adaman Mutual Water Company is a Non-Profit Corporation organized under the laws of the State of Arizona. Its purpose is to provide irrigation water and irrigation facilities for the lands within the Project together with some domestic water. All of the issued and outstanding stock of the Company is owned by Project landowners in proportion to the acreage each owns. The stock ownership and rights and obligations of the stockholders are perpetually and inseparably bound and tied to the Project lands they own. These lands may not be transferred without the stock incident thereto, nor may the stock be transferred without the land. The initial cost of the Company and the cost and expense for the maintenance and operation of the Company are liens upon the stock and upon the land in amounts proportionate to the acreage each tract bears to the total acreage of the Project. The obligation to pay the charges and assessments therefor are like the liens they create, inseparably appurtenant to the lands concerned, may not be transferred or separated therefrom, and are subject to enforcement by foreclosure, all of which is more particularly set forth in the following Exhibits incorporated herein and made a part hereof by reference:

Exhibit 7, being the Articles of Adaman Mutual Water Company and Amendment thereto;

Exhibit 8, being the Bylaws of Adaman Mutual Water Company;

Exhibit 9, being the Stock Subscription Agreement to which each fee owner and contract purchaser of lands within the Project is signatory.

which obligations to the Adaman Mutual Water Company are further referred to in the deeds, agreements for sale and leases as set forth in Exhibits 3, 4, 5 and 6 hereof.

VIII.

The aforescribed Order for Delivery of Possession for approximately two hundred thirty-three (233) acres of lands within the Project represents a taking of approximately 8.3 per cent of the former total Project acreage. However, the cost of maintenance of the Adaman Mutual Water Company is neither decreased by 8.3 per cent or at all, for the reason that no decrease was possible or was made in the number of wells, or in the number, length or size of ditches, pipelines, pumps or other facilities of the Company in order to serve what remains of the Project. Neither were any other substitute lands available for inclusion within the Project. Therefore, 91.7 per cent of the lands in the Project (being all that now remains after condemnation) will forever and a day bear, in addition to their fair proportion of the cost of the maintenance and operation of the Company, the burden of an added 8.3 per cent of this cost formerly borne

by lands removed therefrom by the said Declaration of Taking.

IX.

These Interveners further allege that the approximately two hundred thirty-three (233) acres of land within the Project taken by the United States of America, by virtue of the Order for Delivery of Possession, was, as heretofore set forth, impressed with the perpetual and non-separable obligation to pay and maintain its prorata share of the cost of the construction, operation and maintenance of the Company's facilities; and said obligation constituted covenants running with and liens upon that land. Therefore, the United States of America, in taking said land but refusing to recognize or assume the obligation of the cost of the prorata share of the operation and maintenance expense (and assuming only the obligation of the prorata share of initial construction cost) has taken substantial and valuable rights from the Company and the stockholders thereof. These are the rights to assess and collect from the owners of such lands the prorata share of such costs of the maintenance and operation of the Company and such taking constitutes at law a taking for which compensation must be granted.

X.

These Interveners allege 8.3 per cent of the average annual operation and maintenance cost of the facilities of the Company (exclusive of charges for water used) is approximately Sixteen Hundred and no/100 (\$1600.00) Dollars per year. Interveners

further allege the amount necessary to be invested at six (6) per cent per annum to provide said sum is Twenty-seven Thousand and no/100 (\$27,000.00) Dollars. In addition, Interveners allege the life of these facilities is not to exceed fifteen (15) years. The present day value of the annual payment which would otherwise have been made by the owners of the lands taken, had they remained within the Project, to amortize the investment in the Project during the ensuing fifteen (15) years so that the facilities would be replaced as needed, is approximately Thirty Thousand and no/100 (\$30,000.00) Dollars.

Aircraft Taking:

XI.

As the direct and natural result of the extension of the jet aircraft runways (being the principal use to which condemned Project lands were put), the domestic and agricultural uses of certain of the remaining Project lands, and the value of the improvements thereon, are seriously curtailed and diminished, and, in some cases, totally destroyed. This curtailment, value diminution or destruction, amounting in fact to a taking, affects in varying degrees all of the Interveners who are owners, contract purchasers or lessees of Tracts 20, 21, 19, 22, 16, 38, 23, 17, 39, 24, 25 and 18, as shown on Exhibit 1.

XII.

Interveners allege that during an average day approximately four hundred (400) jet planes from Luke Air Force Base will take off from one of two

runways, said take-off direction being from north-east toward the southwest (being against the direction of the prevailing winds). Said take-offs will vary from single planes to groups of two or more planes. The frequency of said take-offs will vary from hour to hour during an average day from a low of a few planes per hour in the evening to highs of eighty (80) or more per hour during certain of the morning, noon and early afternoon hours and that the times of such take-offs will vary from day to day. The two runways aforescribed are more clearly shown as the heavy solid blue lines on the map entitled "Exhibit 1."

XIII.

Intervenors allege that the height of said planes taking off from the northern runway as they cross the lands of Intervenors nearest the runways is ten (10) feet above the ground and the height said planes cross lands of Intervenors farthest from the runways is only one hundred twenty (120) feet above the ground; that the height of the planes taking off from the southernmost runway as they cross lands of Intervenors nearest the runway is fifty (50) feet above the ground and as they cross the farthest lands, one hundred eighty (180) feet above the ground; all as more clearly shows on Exhibit 1.

XIV.

Intervenors allege that danger from such planes, the flames shooting behind them, the tow targets and machinery and oil they drop, the deafening

noise they create and the constant fear of crashes into people working the fields, into farm machinery or into barns, homes, water towers, etc., causes the following damages (to a greater or lesser degree to each Intervener depending on the relative location of the tract, the improvements thereon and the use or uses to which the tract and the improvements thereon are put):

(a) Interveners with houses find the houses become unsafe in which to live. Other houses become so noisy and shaken as to prohibit their being satisfactory dwellings or places within which to conduct a family life and raise children.

(b) Interveners raising crops (such as cotton) of a character to require dusting by plane are completely unable to secure the services of certain crop dusters and can secure others only upon certain week ends when it is known in advance that the jet planes will not be flying, (and then, only if the air conditions are satisfactory), causing damage to crops, making the farming thereof more expensive and precarious, and, in some cases, making lands unusable for such crops.

(c) Interveners engaged in feeding beef cattle for market must extend the feeding time period by one-third in order to make up for the two to five-week period it takes for new cattle to quiet and become partially accustomed to the noise.

(d) Interveners engaged in grazing beef cattle on alfalfa must similarly extend the duration graz-

ing period as the cattle in the field never become completely accustomed to the noise.

(e) Interveners engaged in dairying are damaged by both lesser milk production and lowered butterfat content of milk as the result of said noise and disturbance.

(f) Interveners engaged in raising or feeding any livestock or in dairying must get rid of all temperamental animals.

(g) All Interveners hereunder, allege the constant proximity of the planes and the attendant noise and danger decreases the efficiency of all farm labor by at least twenty-five (25) per cent.

(h) Certain Interveners whose lands lie closest to the runways find the planes so low as to eliminate all use, agricultural, domestic or otherwise, of said lands.

(i) All Interveners herein find tillable hours reduced, farm machinery damaged by dropped tow targets and parts, farm values and home values diminished or destroyed, together with multiple other attendant and auxiliary damages.

XV.

Intervener, Goodyear Farms, owner of Tract 19, said tract being a parcel of land approximately fifteen (15) acres in size (located as shown on Exhibit 1 hereof, the property description for which is set forth in Exhibit 2 hereof) claims and alleges: That prior to the events and takings by the United

States of America and the United States Air Force heretofore set forth in this Petition, said Tract 19 had a fair market value of Five Hundred and no/100 (\$500.00) Dollars per acre. Further, that since these events, a good portion of Tract 19 has been rendered wholly and totally useless for any purpose, agricultural, domestic or otherwise. And the remainder of said tract has been so substantially taken and natural agricultural and domestic uses to which it could and was previously put, so substantially restricted, diminished and taken as heretofore set forth in this Petition (and particularly in Article VI through XIV hereof) as to give said tract now a fair market value of not to exceed One Hundred and no/100 (\$100.00) Dollars. Therefore, by reason of the foregoing, Intervener, Goodyear Farms, has suffered a taking resulting in damage to its above-described real property in Tract 19 in the sum of Six Thousand and no/100 (\$6000.00) Dollars.

XVI.

Intervener, B. W. Mullins, Lessee of the said Tracts 19 and 17 described in Article XV immediately above, claims and alleges that but for the events and takings by the United States of America and the United States Air Force heretofore set forth, he would have planted the fifteen (15) acres, which comprise the said Tract 19, in cotton. Because, however, planes cross Tract 19 from the northernmost runway at levels from ten to twenty feet above the ground, and because therefore of the impossibility of securing dusting by plane, the im-

possibility of using either mechanical or human pickers, together with the impossibility of defoliation, Intervener planted said fifteen acres of his cotton allotment in his leased land being Tract 17. The best ground in the said Tract 17 was, however, already planted in alfalfa and it being unsound economically to plow up the alfalfa, the cotton had to be planted in less desirable ground in Tract 17. As planes from the northernmost runway cross Tract 17 at levels of fifteen feet, mechanical pickers are not usable. Said Intervener alleges that as the result of having to plant his cotton on poorer ground, he will lose a minimum of three-quarters ($\frac{3}{4}$) of a bale per acre sustaining a total loss of about eleven and one-half ($11\frac{1}{2}$) bales, or not less than Nineteen Hundred and no/100 (\$1900.00) Dollars from this cause; and by being required to use hand pickers instead of mechanical pickers he will lose an added Three Hundred and no/100 (\$300.00) Dollars making a total loss to Intervener, B. W. Mullins, on said Tracts 19 and 17, of not less than Twenty-two Hundred and no/100 (\$2200.00) Dollars.

XVII.

Intervener, Goodyear Farms, owner of Tract 22, said tract being a parcel of land approximately eighty (80) acres in size, (located as shown on Exhibit 1 hereof, the property description for which is set forth in Exhibit 2 hereof), containing improvements consisting of a residence, dairy barn, storage sheds and corrals, claims and alleges that prior to the events and takings by the United States

of America and the United States Air Force heretofore set forth in this Petition, said Tract 22 had a fair market value of Five Hundred and no/100 (\$500.00) Dollars per acre, and the improvements on said Tract 22 had a fair market value of Sixty-six Hundred and no/100 (\$6600.00) Dollars. Further, that since these events, said lands and improvements, and the natural agricultural and domestic uses to which they can be put have been so substantially restricted, diminished and taken as heretofore set forth in this Petition (and particularly in Article VI through XIV hereof) as to give the land in said tract a now fair market value of not to exceed One Hundred and no/100 (\$100.00) Dollars per acre, and the improvements on said tract a fair market value of not to exceed Nine Hundred and Ninety (\$990.00) Dollars, therefore, by reason of the foregoing, Intervener, Goodyear Farms, has suffered a taking resulting in damage to its above-described real property and the improvements thereon in the sum of not less than Thirty-seven Thousand Six Hundred and Ten and no/100 (\$37,610.00) Dollars.

XVIII.

Intervener, James H. Sharp, Lessee of Tract 22 described in Article XVII immediately above, claims and alleges that but for the events and takings by the United States of America and the United States Air Force heretofore set forth, he would have been able to dust the twenty-eight acres of cotton he is raising on the said Tract 22 by the

use of crop dusters with planes and would have been able to use mechanical pickers for picking the said cotton crop. Further, but for the said events and takings, said Intervener would be able to cut alfalfa, grown on the balance of the tract for green feed with the usual fourteen foot high rig and equipment necessary to load the same up into a trailer. Because, however, planes cross the said Tract 22 from the northernmost runway at levels from fifteen to twenty feet above the ground, and because therefore of the impossibility of securing dusting by plane or using mechanical pickers, Intervener alleges he will lose not less than Fifty-five and no/100 (\$55.00) Dollars per acre on his cotton crop. As Intervener's cotton allotment and the amount of acreage which he has planted to cotton) is twenty-eight (28) acres, the Intervener alleges a loss of not less than Fifteen Hundred Forty and no/100 (\$1540.00) Dollars on his cotton crop. Further, Intervener alleges that due to his inability to raise alfalfa for green feed as above-described and the fact that he must now raise it for hay, Intervener has sustained an additional loss of not less than Five Hundred and no/100 (\$500.00) Dollars, making the total loss to Intervener, James H. Sharp, a sum of not less than Two Thousand Forty and no/100 (\$2040.00) Dollars.

XIX.

Intervener, Goodyear Farms, owner of Tract 16, said tract being a parcel of land approximately eighty (80) acres in size (located as shown on Ex-

hibit 1 hereof, the property description for which is set forth in Exhibit 2 hereof) claims and alleges: That prior to the events and takings by the United States of America and the United States Air Force heretofore set forth in this Petition, said Tract 16 had a fair market value of Five Hundred and no/100 (\$500.00) Dollars per acre. Further, that since these events, a good portion of Tract 16 has been rendered wholly and totally useless for any purpose, agricultural, domestic or otherwise. And the remainder of said Tract has been so substantially taken and natural agricultural and domestic uses to which it could and was previously put, so substantially restricted, diminished and taken as heretofore set forth in this Petition (and particularly in Article VI through XIV hereof) as to give said tract a now fair market value of not to exceed One Hundred and no/100 (\$100.00) Dollars. Therefore, by reason of the foregoing, Intervener, Good-year Farms, has suffered a taking resulting in damage to its above-described real property in Tract 16 in the sum of Thirty-two Thousand and no/100 (\$32,000.00) Dollars.

XX.

Intervener, George W. Busey, Lessee of Tract 16 described in Article XIX immediately above, claims and alleges that but for the events and takings by the United States of America and the United States Air Force heretofore set forth, he would have been able to dust the thirty-two acres of cotton he is raising on the said Tract 16 by the use of crop dusters with planes and would have been able to use me-

chanical pickers for picking the said cotton crop. Because, however, planes cross the said Tract 16 from the northernmost runway at levels from five to twenty-five feet above the ground, and because therefore of the impossibility of securing dusting by plane or using mechanical pickers, Intervener alleges he will lose not less than Fifty-five and no/100 (\$55.00) Dollars per acre on his cotton crop. As Intervener's cotton allotment (and the amount of acreage which he has planted to cotton) is thirty-two (32) acres, the Intervener alleges a loss of not less than Seventeen Hundred Sixty and no/100 (\$1760.00) Dollars.

XXI.

Intervener, Goodyear Farms, owner of Tract 17, said tract being a parcel of land approximately sixty-five (65) acres in size, (located as shown on Exhibit 1 hereof, the property description for which is set forth in Exhibit 2 hereof), containing improvements consisting of a residence, dairy barn, storage shed and corrals, claims and alleges that prior to the events and takings by the United States of America and the United States Air Force heretofore set forth in this Petition, said Tract 17 had a fair market value of Five Hundred and no/100 (\$500.00) Dollars per acre, and the improvements on said Tract 17 had a fair market value of Seven Thousand and no/100 (\$7000.00) Dollars. Further, that since these events, said lands and improvements, and the natural agricultural and domestic uses to which they can be put have been so substan-

tially restricted, diminished and taken as heretofore set forth in this Petition (and particularly in Article VI through XIV hereof) as to give the land in said tract a now fair market value of not to exceed Two Hundred and no/100 (\$200.00) Dollars per acre, and the improvements on said tract a fair market value of not to exceed Seventeen Hundred Fifty and no/100 (\$1750.00) Dollars. Therefore, by reason of the foregoing, Intervener, Goodyear Farms, has suffered a taking resulting in damage to its above-described real property and the improvements thereon in the sum of not less than Twenty-four Thousand Seven Hundred Fifty and no/100 (\$24,750.00) Dollars.

XXII.

Intervenors, Carlon A. Hinton and Verna Hinton, contract purchasers of Tract 23, said tract being a parcel of land approximately eighty (80) acres in size, (located as shown on Exhibit 1 hereof, the property description for which is set forth in Exhibit 2 hereof), containing improvements consisting of an owners' residence, a residence for laborers, dairy barn, auxiliary barn, garage, corrals and shop, claim and allege that prior to the events and takings by the United States of America and the United States Air Force heretofore set forth in this Petition, said Tract 23 had a fair market value of Five Hundred and no/100 (\$500.00) Dollars per acre, and the improvements on said Tract 23 had a fair market value of Thirty-four Thousand Seven Hundred and no/100

(\$34,700.00) Dollars. Further, that since these events, said lands and improvements, and the natural agricultural and domestic uses to which they can be put have been so substantially restricted, diminished and taken as heretofore set forth in this Petition (and particularly in Article VI through XIV hereof) as to give the land in said tract a now fair market value of not to exceed Two Hundred and no/100 (\$200.00) Dollars per acre, and the improvements on said tract a fair market value of not to exceed Five Thousand Two Hundred Five and no/100 (\$5205.00) Dollars. Therefore, by reason of the foregoing, Interveners, Carlon A. Hinton and Verna Hinton, have suffered a taking resulting in damage to their above-described real property and the improvements thereon in the sum of not less than Fifty-three Thousand Four Hundred Ninety-five and no/100 (\$53,495.00) Dollars.

XXIII.

Interveners, Carlon A. Hinton and Verna Hinton, contract purchasers of Tract 25, said tract being a parcel of land approximately forty (40) acres in size (located as shown on Exhibit 1 hereof, the property description for which is set forth in Exhibit 2 hereof) claims and alleges, that prior to the events and takings by the United States of America and the United States Air Force heretofore set forth in this Petition, said Tract 25 had a fair market value of Five Hundred and no/100 (\$500.00) Dollars per acre. Further, that since these events, a good portion of Tract 25 has been rendered

wholly and totally useless for any purpose, agricultural, domestic or otherwise. And the remainder of said tract has been so substantially taken and natural agricultural and domestic uses to which it could and was previously put, so substantially restricted, diminished and taken as heretofore set forth in this Petition (and particularly in Article VI through XIV hereof) as to give said tract a now fair market value of not to exceed Two Hundred Sixty and no/100 (\$260.00) Dollars. Therefore, by reason of the foregoing, Interveners, Carlon A. Hinton and Verna Hinton, have suffered a taking resulting in damage to their above-described real property in Tract 25 in the sum of Ninety Six Hundred and no/100 (\$9,600.00) Dollars.

XXIV.

Interveners, Harold Ralph Hunt and Georgia May Hunt, owners of Tract 38, said tract being a parcel of land approximately eighty (80) acres in size, (located as shown on Exhibit 1 hereof, the property description for which is set forth in Exhibit 2 hereof), containing improvements consisting of a residence, garage, storage sheds, granary, corals and scales, claim and allege that prior to the events and takings by the United States of America and the United States Air Force heretofore set forth in this Petition, said Tract 38 had a fair market value of Five Hundred and no/100 (\$500.00) Dollars per acre, and the improvements on said Tract 38 had a fair market value of Twenty-Three Thousand and no/100 (\$23,000.00) Dollars.

Further, that since these events, said lands and improvements, and the natural agricultural and domestic uses to which they can be put have been so substantially restricted, diminished and taken as heretofore set forth in this Petition (and particularly in Article VI through XIV hereof) as to give the land in said tract a now fair market value of not to exceed Two Hundred Ninety and no/100 (\$290.00) Dollars per acre, and the improvements on said tract a fair market value of not to exceed Three Thousand Four Hundred Fifty and no/100 (\$3,450.00) Dollars. Therefore, by reason of the foregoing, Interveners, Harold Ralph Hunt and Georgia May Hunt, have suffered a taking resulting in damage to their above-described real property and the improvements thereon in the sum of not less than Thirty-Six Thousand Three Hundred Fifty and no/100 (\$36,350.00) Dollars.

XXV.

Interveners, George Reismann and Joanna Reismann, owners of Tract 39, said tract being a parcel of land approximately eighty (80) acres in size (located as shown on Exhibit 1 hereof, the property description for which is set forth in Exhibit 2 hereof) containing improvements consisting of a residence, bath house, sheds, granary, shop, barn, grain tanks and corrals, claim and allege that prior to the events and takings by the United States of America and the United States Air Force heretofore set forth in this Petition, said Tract 39 had a fair market value of Five Hundred and no/100

(\$500.00) Dollars per acre, and the improvements on said Tract 39 had a fair market value of Twelve Thousand Five Hundred and no/100 (\$12,500.00) Dollars. Further, that since these events, said lands and improvements, and the natural agricultural and domestic uses to which they can be put have been so substantially restricted, diminished and taken as heretofore set forth in this Petition (and particularly in Article VI through XIV hereof) as to give the land in said tract a now fair market value of not to exceed Two Hundred Sixty and no/100 (\$260.00) Dollars per acre, and the improvements on said tract a fair market value of not to exceed Eighteen Hundred Seventy-Five and no/100 (\$1,875.00) Dollars. Therefore, by reason of the foregoing, Interveners, George Reismann and Joanna Reismann, have suffered a taking resulting in damage to their above-described real property and the improvements thereon in the sum of not less than Twenty-Nine Thousand Eight Hundred Twenty-Five and no/100 (\$29,825.00) Dollars.

XXVI.

Interveners, Raymond F. Austerman and Zula Austerman, owners of Tract 24, said tract being a parcel of land approximately forty (40) acres in size (located as shown on Exhibit 1 hereof, the property description for which is set forth in Exhibit 2 hereof), containing improvements consisting of a residence, dairy barn, workers' residence, garage, shed and corrals, claim and allege that prior to the events and takings by the United States of

America and the United States Air Force heretofore set forth in this Petition, said Tract 24 had a fair market value of Five Hundred and no/100 (\$500.00) Dollars per acre, and the improvements on said Tract 24 had a fair market value of Twenty-Two Thousand Three Hundred and no/100 (\$22,300.00) Dollars. Further, that since these events, said lands and improvements, and the natural agricultural and domestic uses to which they can be put have been so substantially restricted, diminished and taken as heretofore set forth in this Petition (and particularly in Article VI through XIV hereof) as to give the land in said tract a now fair market value of not to exceed Two Hundred Thirty and no/100 (\$230.00) Dollars per acre, and the improvements on said tract a fair market value of not to exceed Three Thousand Three Hundred Forty-Five and no/100 (\$3,345.00) Dollars. Therefore, by reason of the foregoing, Interveners, Raymond F. Austerman and Zula Austerman, have suffered a taking resulting in damage to its above-described real property and the improvements thereon in the sum of not less than Twenty-Nine Thousand Seven Hundred Fifty-Five and no/100 (\$29,755.00) Dollars.

XXVII.

Interveners, Leon Fort and Doris C. Fort, contract purchasers of Tract 18, said tract being a parcel of land approximately eighty (80) acres in size (located as shown on Exhibit 1 hereof, the property description for which is set forth in Exhibit 2 hereof) containing improvements consist-

ing of a residence, storage shed and corrals, claim and allege that prior to the events and takings by the United States of America and the United States Air Force heretofore set forth in this Petition, said Tract 18 had a fair market value of Five Hundred and no/100 (\$500.00) Dollars per acre, and the improvements on said Tract 18 had a fair market value of Fifty-Six Hundred and no/100 (\$5,600.00) Dollars. Further, that since these events, said lands and improvements, and the natural agricultural and domestic uses to which they can be put have been so substantially restricted, diminished and taken as heretofore set forth in this Petition (and particularly in Article VI through XIV hereof) as to give the land in said tract a now fair market value of not to exceed Four Hundred Seventy and no/100 (\$470.00) Dollars per acre, and the improvements on said tract a fair market value of not to exceed Two Thousand Eight Hundred and no/100 (\$2,800.00) Dollars. Therefore, by reason of the foregoing, Interveners, Leon Fort and Doris C. Fort, have suffered a taking resulting in damage to its above-described real property and the improvements thereon in the sum of not less than Fifty-Two Hundred and no/100 (\$5,200.00) Dollars.

XXVIII.

Interveners, John Newton Edge and Mary Elizabeth Edge, owners of Tracts 35 and 36, said tracts being two parcels of land totalling approximately one hundred twenty (120) acres in size (located as shown on Exhibit 1 hereof, the property descrip-

tion for which is set forth in Exhibit 2 hereof) containing certain improvements consisting of a residence, two (2) dairy barns, a granary, shops, a residence for laborers and corrals, claim and allege that prior to the events and takings by the United States of America and the United States Air Force heretofore set forth in this Petition, the improvements on said Tracts 35 and 36 had a fair market value in the amount of Thirty-Two Thousand and no/100 (\$32,000.00) Dollars. Further, that since these events the natural agricultural and domestic uses to which these improvements can be put has been so substantially restricted, diminished and taken as heretofore set forth in this Petition (and particularly in Article VI through XIV hereof) as to give said improvements a now fair market value of not to exceed Twenty-Four Thousand and no/100 (\$24,000.00) Dollars. Therefore, by reason of the foregoing, Interveners John Newton Edge and Margaret Elizabeth Edge, have suffered a taking resulting in damage to their above-described real property and the improvements thereon in the sum of Eight Thousand and no/100 (\$8,000.00) Dollars.

XXIX.

Intervener, Adaman Mutual Water Company, an Arizona Non-Profit Corporation, owner of Tract 20, said tract being a parcel of land totalling approximately fifteen (15) acres in size (located as shown on Exhibit 1 hereof, the property description for which is set forth in Exhibit 2 hereof) containing certain improvements consisting of a club

house, two (2) hay barns, storage barns, scales and corrals, claims and alleges that prior to the events and takings by the United States of America and the United States Air Force heretofore set forth in this Petition, the improvements on said Tract 20 had a fair market value in the amount of Twenty-Four Thousand and no/100 (\$24,000.00) Dollars. Further, that since these events the natural agricultural and domestic uses to which these improvements can be put has been so substantially restricted, diminished and taken as heretofore set forth in this Petition (and particularly in Article VI through XIV hereof) as to give said improvements a now fair market value of not to exceed Twenty Thousand Four Hundred and no/100 (\$20,400.00) Dollars. Therefore, by reason of the foregoing, Intervener, Adaman Mutual Water Company has suffered a taking resulting in damage to their above-described real property and the improvements thereon in the sum of Three Thousand Six Hundred and no/100 (\$3,600.00) Dollars.

XXX.

Intervener, Goodyear Farms, owner of Tract 21, said tract being a parcel of land totalling approximately thirty (30) acres in size (located as shown on Exhibit 1 hereof, the property description for which is set forth in Exhibit 2 hereof), containing certain improvements consisting of a residence, claims and alleges that prior to the events and takings by the United States of America and the United States Air Force heretofore set forth in this

Petition, the improvements on said Tract 21 had a fair market value in the amount of Forty-Five Hundred and no/100 (\$4,500.00) Dollars. Further, that since these events the natural agricultural and domestic uses to which these improvements can be put has been so substantially restricted, diminished and taken as heretofore set forth in this Petition (and particularly in Article VI through XIV hereof) as to give said improvements a now fair market value of not to exceed Three Thousand Eight Hundred Twenty-Five and no/100 (\$3,825.00) Dollars. Therefore, by reason of the foregoing, Intervener, Goodyear Farms has suffered a taking resulting in damage to its above-described real property and the improvements thereon in the sum of Six Hundred Seventy-Five and no/100 (\$675.00) Dollars.

Wherefore, Interveners, and each of them, pray judgment against plaintiff, the United States of America as follows:

1. Adaman Mutual Water Company on behalf of itself, as a water company, and owner of fee lands within the Adaman Reclamation Project and on behalf of its stockholders, the other Interveners herein, as their interests may appear, the total sum of Fifty-Seven Thousand and no/100 (\$57,000.00) Dollars.

2. Goodyear Farms for takings and damages done to Tract 19, said tract and damages more particularly described in Article XV hereof, the total sum of Six Thousand and no/100 (\$6,000.00) Dollars.

3. B. W. Mullins for takings and damages done to Tracts 17 and 19, said tracts and damages more particularly described in Article XVI hereof, the sum of Twenty-Two Hundred and no/100 (\$2,-200.00) Dollars.

4. Goodyear Farms for takings and damages done to Tract 22, said tract and damages more particularly described in Article XVII hereof, the total sum of Thirty-Seven Thousand Six Hundred and Ten and no/100 (\$37,610.00) Dollars.

5. James H. Sharp for takings and damages done to Tract 22, said tract and damages more particularly described in Article XVIII hereof, the total sum of Two Thousand Forty and no/100 (\$2,-040.00) Dollars.

6. Goodyear Farms for takings and damages done to Tract 16, said tract and damages more particularly described in Article XIX hereof, the total sum of Thirty-Two Thousand and no/100 (\$32,-000.00) Dollars.

7. George W. Busey for takings and damages done to Tract 16, said tract and damages more particularly described in Article XX hereof, the total sum of One Thousand Seven Hundred Sixty and no/100 (\$1,760.00) Dollars.

8. Goodyear Farms for takings and damages done to Tract 17, said tract and damages more particularly described in Article XXI hereof, the total sum of Twenty-Four Thousand Seven Hundred Fifty and no/100 (\$24,750.00) Dollars.

9. Carlon A. Hinton and Verna Hinton, his wife, for takings and damages done to Tract 23, said tract and damages more particularly described in Article XXII hereof, the total sum of Fifty-Three Thousand Four Hundred Ninety-Five and no/100 (\$53,495.00) Dollars.

10. Carlon A. Hinton and Verna Hinton, his wife, for takings and damages done to Tract 25, said tract and damages more particularly described in Article XXIII hereof, the total sum of Ninety Six Hundred and no/100 (\$9,600.00) Dollars.

11. Harold Ralph Hunt and Georgia May Hunt, his wife, for takings and damages done to Tract 38, said tract and damages more particularly described in Article XXIV hereof, the total sum of Thirty-Six Thousand Three Hundred Fifty and no/100 (\$36,350.00) Dollars.

12. George Reismann and Joanna Reismann, his wife, for takings and damages done to Tract 39, said tract and damages more particularly described in Article XXV hereof, the total sum of Twenty-Nine Thousand Eight Hundred Twenty-Five and no/100 (\$29,825.00) Dollars.

13. Raymond F. Austerman and Zula Austerman, his wife, for takings and damages done to Tract 24, said tract and damages more particularly described in Article XXVI hereof, the total sum of Twenty-Nine Thousand Seven Hundred Fifty-Five and no/100 (\$29,755.00) Dollars.

14. Leon Fort and Doris C. Fort, his wife, for takings and damages done to Tract 18, said tract

and damages more particularly described in Article XXVII hereof, the total sum of Five Thousand Two Hundred and no/100 (\$5,200.00) Dollars.

15. John Newton Edge and Mary Elizabeth Edge, his wife, for takings and damages done to Tracts 35 and 36, said tracts and damages more particularly described in Article XXVIII hereof, the total sum of Eight Thousand and no/100 (\$8,000.00) Dollars.

16. Goodyear Farms for takings and damages done to Tract 21, said tract and damages more particularly described in Article XXX hereof, the total sum of Six Hundred Seventy-Five and no/100 (\$675.00) Dollars:

and as to each of the foregoing, together with interest thereon at the rate of six (6) per cent per annum from the date of the filing of the Declaration of Taking (being November 27, 1953) until paid, and for their costs herein incurred, together with such other relief as shall be deemed proper in the premises.

SNELL & WILMER,

By /s/ EDWARD JACOBSON,

Attorney for Interveners.

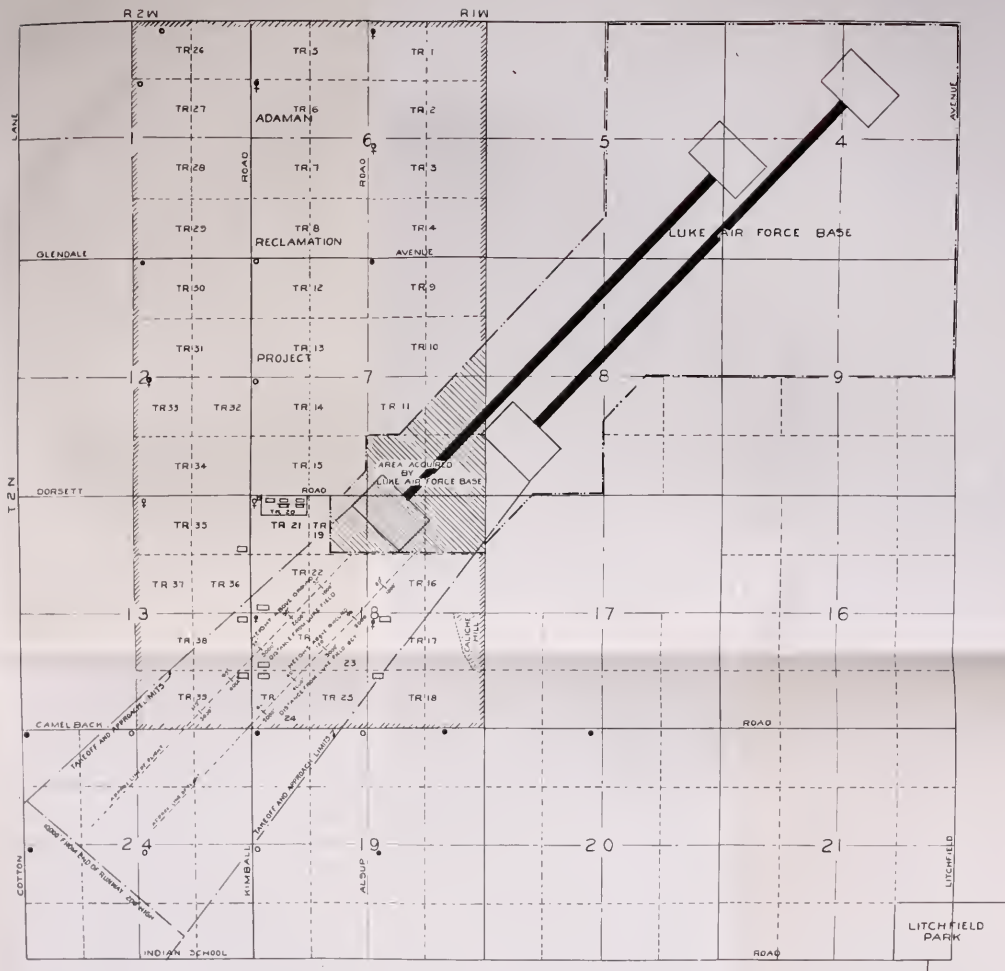
Received 3 copies of the foregoing Petition this 23rd day of July, 1954,

U. S. DISTRICT ATTORNEY,

By /s/ E. L. GORDON,

Assistant U. S. Attorney,

Attorney for Plaintiff.



ADAMAN PROJECT

257165 AC GROSS
 7135 AC DITCHWAYS & ROADS
 1663 AC UNCULTIVATED CALKIE HILL TRAP
 1057 AC BUILDING SITE TR 19
 2495 DE AC CULTURATED

MAP SHOWING ADAMAN RECLAMATION PROJECT AND ADJACENT AREA

LEGEND



HOUSES, DUE TO SCALE OF MAP BARNES AND OTHER AUXILIARY BUILDINGS NOT SHOWN
 WELL AND TOWER APPROX 35 FT HIGH
 WATER TANK TOWER APPROX 34 FT HIGH

SCALE 1 IN = 320 FT DATE JULY 1954 DRAWING NFA-1013

TRM	OWNERSHIP
1	ADAMAN RECLAMATION DIST. C.P.
2	ADAMAN RECLAMATION DIST. C.P.
3	ADAMAN RECLAMATION DIST. C.P.
4	ADAMAN RECLAMATION DIST. C.P.
5	ADAMAN RECLAMATION DIST. C.P.
6	ADAMAN RECLAMATION DIST. C.P.
7	ADAMAN RECLAMATION DIST. C.P.
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10	ADAMAN RECLAMATION DIST. C.P.
11	ADAMAN RECLAMATION DIST. C.P.
12	ADAMAN RECLAMATION DIST. C.P.
13	ADAMAN RECLAMATION DIST. C.P.
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17	ADAMAN RECLAMATION DIST. C.P.
18	ADAMAN RECLAMATION DIST. C.P.
19	ADAMAN RECLAMATION DIST. C.P.
20	ADAMAN RECLAMATION DIST. C.P.

TRM	OWNERSHIP
21	ADAMAN RECLAMATION DIST. C.P.
22	ADAMAN RECLAMATION DIST. C.P.
23	ADAMAN RECLAMATION DIST. C.P.
24	ADAMAN RECLAMATION DIST. C.P.
25	ADAMAN RECLAMATION DIST. C.P.
26	ADAMAN RECLAMATION DIST. C.P.
27	ADAMAN RECLAMATION DIST. C.P.
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29	ADAMAN RECLAMATION DIST. C.P.
30	ADAMAN RECLAMATION DIST. C.P.
31	ADAMAN RECLAMATION DIST. C.P.
32	ADAMAN RECLAMATION DIST. C.P.
33	ADAMAN RECLAMATION DIST. C.P.
34	ADAMAN RECLAMATION DIST. C.P.
35	ADAMAN RECLAMATION DIST. C.P.
36	ADAMAN RECLAMATION DIST. C.P.
37	ADAMAN RECLAMATION DIST. C.P.
38	ADAMAN RECLAMATION DIST. C.P.

EXHIBIT 3

(Copy)

Warranty Deed

Know all men by these presents: That
....., Grantor, with its principal offices
at, for and in con-
sideration of the sum of \$....., to it
by and,
....., Grantees, has
granted, sold and conveyed and by these presents
does grant, sell and convey unto the said Grantees
the following described real property located in the
County of Maricopa, State of Arizona:

The Grantor excepts and reserves from this con-
veyance and from the premises hereby conveyed
the following items:

Item 1. Rights of way for existing roads, canals,
ditches, laterals, pipe lines, well sites, and pumping
plants or hereafter to be constructed upon said
premises or which the Adaman Mutual Water Com-
pany, an Arizona corporation, may find convenient
or necessary to construct to carry out its corporate
purposes, together with the right of ingress and
egress thereto and therefrom over the lands hereby
conveyed.

Item 2. Rights of way for existing power lines
and substations and telephone lines on said premises
together with the right of ingress and egress thereto
and therefrom.

Item 3. All irrigation wells and domestic wells
serving more than one farm, pumping plants, ma-

chinery, equipment and facilities incident to said wells and pumping plants.

Item 4. All subterranean waters beneath said premises not necessary for domestic, as distinguished from irrigation, use thereon.

This conveyance is further made subject to any liabilities or obligations imposed upon said lands by reason of the inclusion thereof within the boundaries of the Adaman Mutual Water Company, an Arizona Corporation.

To have and to hold the above-described property, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said Grantees, their heirs and assigns forever. And the Grantor hereby binds itself, its successors and assigns, to warrant and defend, all and singular, the said property unto the said Grantees, their heirs and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof, except as to taxes and assessments of all natures and kinds levied and assessed upon or against said property or any part thereof subsequent to the.....day of....., 19.....

In witness whereof, the Grantor has caused this instrument to be executed in its corporate name by its President and its seal to be hereto affixed and attested by its Secretary or Assistant Secretary, this.....day of....., 19.....

By.....,
Its President.

Attest:

.....

State of.....

County of.....—ss.

On this.....day of....., 19....,
before me....., the under-
signed officer, personally appeared.....
....., who acknowledged himself to be
theof....., and that
as such....., being authorized so to do,
executed the foregoing instrument for the purposes
therein contained, by signing the name of the cor-
poration thereto by himself as.....

In witness whereof, I have hereunto set my hand
and official seal.

.....,

Notary Public.

My Commission Expires:.....

EXHIBIT 4

General Form of Mineral Reservation

The Grantor excepts and reserves from this con-
veyance and from the premises hereby conveyed
the following items:

Item 1. All ores and minerals and all oil, gas
and other hydro-carbon substances beneath the sur-
face of the above-described premises with the right
to explore and test for, locate, mine, drill for, ex-
tract, and pump the same, including the right of
access to and the use of such parts of the surface
of said premises as may be necessary for mining,

drilling, extracting, pumping, saving and removing the same.

EXHIBIT 5

(Copy)

Agreement for Sale

Witness the terms of this agreement of sale made and entered into this.....day of....., 1951, by and between Goodyear Farms, a corporation, hereinafter called Seller, and.....and, hereinafter called Buyers:

For and in consideration of the covenants and agreements to Buyers hereinafter contained, Seller Agrees:

1. To sell and convey unto Buyers all that certain parcel of land situated in the County of Maricopa, State of Arizona, described as follows, viz:

The Seller excepts and reserves from the above-described premises and from this agreement to sell the following items:

Item 1. Rights of way for existing roads, canals, ditches, laterals, pipe lines, well sites, and pumping plants or hereafter to be constructed upon said premises by the Seller or which the Adaman Mutual Water Company, an Arizona corporation, may find convenient or necessary to construct to carry out its corporate purposes, together with the right of ingress and egress thereto and therefrom over the lands hereby agreed to be conveyed.

Item 2. Rights of way for existing power lines and substations and telephone lines on said premises together with the right of ingress and egress thereto and therefrom.

Item 3. All irrigation wells and domestic wells serving more than one farm, pumping plants, machinery, equipment and facilities incident to said wells and pumping plants.

Item 4. All subterranean waters beneath said premises not necessary for domestic, as distinguished from irrigation, use thereon.

The foregoing exceptions and reservations shall inure to the benefit of the Seller's successors and assigns and shall run with the land.

Said premises so agreed to be sold, after deducting the exceptions and reservations, contain 77.7 acres more or less.

2. Upon the payment in full of the amount therein agreed to be paid by Buyers, to execute and deliver to Buyers a good and sufficient special warranty deed conveying said property to Buyers, subject to all taxes and assessments on said property levied subsequent to....., 19.....and the foregoing exceptions and reservations, and the rights of Adaman Mutual Water Company.

In consideration of the foregoing and of the execution by Seller of this instrument, Buyers agree.

1. To pay to Seller the principal sum of \$.....together with interest thereon at

the rate of per cent per annum from, 19, on the unpaid balance until paid. Said principal and interest shall be payable at the office of Seller in Litchfield Park, Arizona, in installments of \$., commencing as of the day of, 19, and thereafter until the principal and interest are fully paid. Said payments include the interest due on date of payments as well as amortization of the principal. Attached hereto and made a part of this agreement is an Amortization Table which shows the amount of each payment applied to interest and applied to the principal and the balance of principal due after crediting the payments on the principal and interest.

2. To pay, before they become delinquent, any and all taxes and assessments on said property levied subsequent to, 19, and all assessments made by Adaman Mutual Water Company upon stock of said Company owned by the Buyers and which is appurtenant to said land. In the event Buyer should fail to comply with the provisions of this paragraph, Seller at its option may make such payments and recover the amount thereof, plus interest, from the Buyers or it may declare and enforce a forfeiture of all rights of the Buyers under this agreement and all interest of the Buyers in the land described herein in the manner provided by Paragraph 2 of the Mutual Agreements referred to on page 4 hereof.

3. To keep the buildings erected and to be erected upon said premises insured against loss and damage by fire and tornado to the amount of not less than \$.....in such insurance company or companies as the Seller shall approve, with loss, if any, payable to the Seller as its interest may appear, and to pay the premium for such insurance and forthwith deliver to Seller the policies of such insurance and the receipts for the premiums paid; and in the event of the Buyers' default in obtaining and delivering such policies forthwith, the Seller may at its option procure such insurance, and the premiums therefor with interest shall be repaid by Buyers.

4. To use reasonable diligence to control and keep down Johnson grass, White Horse nettles, bind weed and all other noxious weeds and not let the same mature to seed; and to keep all buildings, improvements, fences in as good a state of repair as the same now are, usual and ordinary wear and tear and damage by fire and elements excepted.

5. To permit Seller or its agent to enter upon the said premises at any or all reasonable hours for the purpose of observing whether or not Buyers are fully complying with all the provisions of this agreement.

The Buyers appoint the Seller irrevocably their attorney in fact to vote their shares in Adaman Mutual Water Company at all stockholders meetings until the purchase price for said land shall have been fully paid.

It is mutually agreed:

1. No transfer or assignment of any rights hereunder or of shares of stock in Adaman Mutual Water Company owned by Buyers shall be made without Seller's written consent first obtained, until the following events shall have concurred: (1)years from the date hereof have elapsed, and (2) Buyers shall have paid.....% of the aforesaid principal sum.

2. Time is of the essence of this agreement and in the event the Buyers shall fail to make any of the payments herein agreed to be made when same shall become due and payable, or in the event the Buyers shall fail to comply with any of the terms hereof, then the Seller may, at its option, enforce its rights hereunder either by the forfeiture of all rights of the Buyers under this agreement and all interest of the Buyers in the land described herein, or by a civil action for specific performance or for the recovery of the purchase price.

3. In the event Seller elects to enforce the forfeiture provisions herein, it may declare such forfeiture by serving upon the Buyers, by mail addressed to them at Litchfield Park, Arizona, or in person, a written declaration of forfeiture. Should the Buyers fail to eliminate all delinquencies and be free from any default, according to the terms of this agreement, before the expiration of ten days from the date of said declaration, all rights, estates and interest hereby created or then existing in favor

of the Buyers or any person claiming under or through them shall utterly cease, terminate and become null and void, and the right of possession and all equitable and legal interests in the premises described herein, and all shares of stock of Adaman Mutual Water Company owned by the Buyers and appurtenant to said land, together with all sums of money theretofore paid by Buyers, shall revert to, revest in, and become the sole property of Seller.

In witness whereof the said Goodyear Farms, the corporate Seller above named, has hereunto caused its corporate name to be signed by its President and its corporate seal to be affixed, and attested by its Assistant Secretary, in triplicate originals, thereunto duly authorized, and the said Buyers have hereunto subscribed their names, all on the day and year first above written.

GOODYEAR FARMS,

By.....,
President,
Seller.

Attest:

.....,
Secretary.

.....,
.....,
Buyers.

State of Arizona,
County of Maricopa—ss.

On this, the.....day of....., 19.....,
before me, the undersigned officer, personally ap-
peared....., who acknowledged
himself to be the President of Goodyear Farms, an
Arizona Corporation, that he as such officer, being
authorized so to do, executed the foregoing instru-
ment for the purposes therein contained, by sign-
ing the name of the corporation by himself as Pres-
ident.

In witness whereof I hereunto set my hand and
official seal.

.....,
Notary Public.

My commission expires.....

State of Arizona,
County of Maricopa—ss.

On this the.....day of....., 19.....,
before me, the undersigned officer, personally ap-
peared and
....., known to me to be the
persons whose names are subscribed to the within
instrument and that they executed the same for
the purpose therein contained.

In witness whereof I hereunto set my hand and
official seal.

.....,
Notary Public.

My commission expires.....

EXHIBIT 6

Agricultural Lease

To

.....

This Lease made.....day of.....
....., 195....., between Goodyear Farms, a
corporation, Lessor, and.....
.....,
Lessee:

Witnesseth:

I.

In consideration of the payment by Lessee of
the rent herein reserved and the performance of
and abiding his covenants herein contained, Lessor
leases to Lessee:

(a) The.....of Section....., Town-
ship....., Range....., Gila and Salt
River Base and Meridian, containing.....
acres, more or less; and

Together with all the privileges and appurte-
nances thereunto pertaining including such water
for irrigation, stock watering and domestic uses, as
the land described in sub-paragraph (a) of this
Paragraph may be entitled to receive and bene-
ficially use by virtue of such land being within and
a part of the Adaman Reclamation Project and
in accordance with the articles of incorporation, the
by-laws and the rules and regulations of Adaman
Mutual Water Company, a corporation.

To have and to hold unto the Lessee said premises and appurtenances for the term beginning, 195....., and ending.....
, 195....., unless this lease be sooner terminated as herein provided.

II.

In consideration of this lease, Lessee covenants:

1. To pay (a) To Lessor at its office at Litchfield Park, Arizona \$......as rental for the premises described in sub-paragraph (a) of Paragraph I in the following installments:

\$..... on, 195....., \$...... on
 195....., and \$...... on
, 195.....

2. To pay (b) to Adaman Mutual Water Company, as they become due, all charges it may make for water furnished for irrigation, stock watering and domestic use on the land described in sub-paragraph (a) of Paragraph I.

Should Lessee fail to so pay said water charges as above provided, Lessor, without notice, may (a) terminate this lease or (b) pay said charges for account of Lessee and add such payments to the rent agreed to be paid by Lessee as provided in sub-paragraph 1 of this Paragraph and charge interest on such payments at $5\frac{1}{2}\%$ per annum from date of payment.

3. To properly irrigate and care for all trees that may be planted on the leased premises, and

keep said premises in a reasonable neat, attractive and orderly condition.

4. He will at all times during the term of this lease, farm said premises in first-class husband-like manner, using reasonable diligence to control and keep down Johnson grass, White Horse Nettles, Bind Weed and all other noxious weeds on the leased premises and along the ditches and fences thereon and the roadways adjacent thereto and not let the same mature seed; and to use reasonable efforts to prevent and control grasshopper infestation of said premises.

Should Lessee fail to perform his obligations contained in this sub-paragraph of this Paragraph to the satisfaction of Lessor, the latter, at the expense of Lessee, may perform such work and labor as in its judgment may be necessary to carry into effect such of the Lessee's said covenants and obligations with respect to which he may be in default, and Lessee agrees to pay the Lessor, upon demand, any expense so incurred.

5. To permit Lessor or its agents to enter upon the leased premises at any or all reasonable hours for any lawful purpose not inconsistent with Lessee's use and occupancy under this lease.

6. Not to assign this lease or sublet any part of the leased premises without the written consent of Lessor.

7. Upon the expiration or sooner termination of this lease, to surrender to Lessor peaceable possession of leased premises.

8. To at all times during the term of this lease keep all buildings, fences, irrigation ditches and all improvements now or hereafter placed on the premises, in as good a state of repair as when possession thereof is received by the Lessee, usual and ordinary wear and tear and damage by fire and elements excepted.

9. Not to commit waste upon or damage to the leased property or the improvements thereon or permit others to do so.

III.

In case of default of the Lessee in the performance of any of his obligations hereunder, the Lessor may, without notice to the Lessee, terminate this lease and immediately take possession of the leased premises; and such cancellation and re-entry shall not have the effect of releasing the Lessee from any of his obligations or covenants hereunder.

In witness whereof, the Lessor and Lessee have executed this lease in triplicate the day and year first above written.

GOODYEAR FARMS,

By.....,

Its Vice President.

.....,

.....,

Lessee.

Attest:

.....,

Secretary.

EXHIBIT 7

Articles of Incorporation of
Adaman Mutual Water Company

Know All Men by These Presents:

That we, A. H. Zieske, Kenneth B. McMicken, W. N. Kring, H. R. Hunt, and George Reismann, whose names are hereunto subscribed, have associated ourselves for the purpose of becoming incorporated under the laws of Arizona and to that end do hereby make, adopt, execute and acknowledge these articles of incorporation.

Article I.

The names, residences and post office addresses of the incorporators are:

Name: A. H. Zieske:

Residence: Litchfield Park, Ariz.

Post office address: Litchfield Park, Ariz.

Name: Kenneth B. McMicken:

Residence: Litchfield Park, Ariz.

Post office address: Litchfield Park, Ariz.

Name: W. N. Kring:

Residence: Litchfield Park, Ariz.

Post office address: Litchfield Park, Ariz.

Name: H. R. Hunt:

Residence: Litchfield Park, Ariz.

Post office address: Litchfield Park, Ariz.

Name: George Reismann:

Residence: Litchfield Park, Ariz.

Post office address: Litchfield Park, Ariz.

Article II.

The name of this corporation is Adaman Mutual Water Company and its principal place of business shall be in and adjacent to Litchfield Park, Maricopa County, State of Arizona, but it may have branch offices and do business and its board of directors may meet for the transaction of business at such other places within or without the State of Arizona as may be found necessary or convenient for the conduct of the business of the corporation.

Article III.

The general nature of the business proposed to be transacted and carried on by this corporation is as follows:

1. To acquire water rights by purchase or appropriation; to purchase or otherwise provide a system of water works for the irrigation of the East Half of Sections 1, 12, and 13; Township 2 North; Range 2 West of the Gila and Salt River Base and Meridian; and Sections 6, 7 and 18; Township 2 North; Range 1 West of the Gila and Salt River Base and Meridian in Maricopa County, Arizona, containing 2880 acres more or less, and for domestic use of the owners of said land; said land shall be known as the Adaman Reclamation Project, and is hereinafter called the "Project."

Said corporation shall be a non-profit one and not be deemed a common carrier or public service corporation but shall be operated solely and ex-

clusively for the benefit of its stockholders. No person not owning or having a contract to purchase land in the Project may be a stockholder in this Corporation.

2. To hold real estate either in fee or by leasehold to the extent reasonably necessary for its business; to issue bonds in any amount authorized by law to secure funds for corporate purposes and to secure the payment thereof by mortgage or deed of trust upon the whole or any part of the real or personal property of the corporation; to borrow money and execute and issue notes therefor or other evidence thereof.

3. To do any and all things incident to the things herein set forth to the same extent as natural persons might or could do.

The foregoing enumeration of specific powers shall not be deemed to limit or restrict in any manner the general powers of the Corporation and its enjoyment and exercise thereof as conferred by the laws of the State of Arizona.

Article IV.

The amount of the authorized capital stock of this corporation shall be three thousand shares of no par value and it shall be issued for such consideration in cash, property or services as the Board of Directors may from time to time determine, payable prior to the issuance of certificates therefor.

Article V.

Each owner of land in the Project, as hereinabove described, shall have the right to subscribe in writing for a number of shares in this corporation equal to the number of acres owned by him or of which he may be in possession under contract of purchase and by his subscription for said stock he shall be deemed to have consented to and agreed to abide by all the terms and provisions of these articles of incorporation, and the by-laws and rules and regulations of the corporation duly adopted by its directors or stockholders.

The corporation shall keep a record of the ownership of land in the Project and of persons in possession of land therein under contract of purchase.

Each share of stock shall entitle its holder to his prorata share of all the waters of this corporation for the irrigation of his land and for domestic use thereon to the extent reasonably necessary therefor but not exceeding four-acre feet of water per acre per year to be delivered in accordance with rules and regulations to be adopted by the board of directors of this corporation.

The board of directors, in its discretion, may deliver to any stockholder additional water at such charges, in addition to assessments, as it may fix.

The subscriptions for stock shall set forth a description of the land owned or held under contract of purchase by the subscriber upon which the water represented by said stock shall be used and to which

lands said water shall become, be and remain appurtenant.

Each share of stock and the land to which it is appurtenant shall be subject to prorata assessments for capital investment of the corporation, for its operation, upkeep, maintenance and the improvements of its water works and property in accordance with rules and regulations to be adopted by the board of directors. The assessments so made shall be a lien upon said stock and upon the land to which it and the water represented thereby is appurtenant.

The payment of assessments may be enforced in such manner as the board of directors from time to time may determine, including either public or private sale of the subscriber's interest in said stock or the land to which it may be appurtenant when any assessment has been made and not paid within thirty days after notice thereof to the stockholder or by the withholding of the delivery of water to the one delinquent.

No assessment shall be made upon or against any stock that is appurtenant to land which has never been in cultivation until such time as said land is brought into cultivation; but before such land shall be entitled to receive water the owner thereof shall make such contribution as the board of directors may deem fair and just to the corporation's capital investment account in order that such owner shall obtain no inequitable advantage over other owners

of land in the Project who have paid assessments for the capital investment of the corporation.

The corporation shall at no time accept subscriptions for shares of stock exceeding the number of acres of land in the Project.

Article VI.

The time of the commencement of this corporation shall be the date of the filing of these articles of incorporation in the office of the Arizona Corporation Commission and the recordation of a certified copy thereof in the office of the County Recorder of Maricopa County, Arizona, and it shall terminate twenty-five years thereafter unless it be renewed in the maner provided by law.

Article VII.

The affairs of this corporation shall be conducted by a board of not less than five nor more than seven directors. The directors shall be elected at the annual meeting of the stockholders which shall be held on the Tuesday after the first Monday in January of each year and they shall serve until their successors are elected and qualified; the following named persons shall constitute the board of directors until their successors are elected and qualified.

A. H. Zieske,
Kenneth B. McMicken,
W. N. Kring,
H. R. Hunt,
George Reismann.

The board shall have the power at any meeting at which a quorum shall be present to elect additional directors but the board shall never consist of more than seven directors; the board shall have the power to fill any vacancies occurring in that number and shall have full power to adopt, alter and amend such prudential bylaws as they may deem proper and to make all rules and regulations expedient for the management of the affairs of the corporation.

The directors need not be stockholders of the corporation nor owners of land in the Project provided they are officers or employees of corporations owning land in the Project.

Article VIII.

The officers of this corporation shall be a president, a vice-president, a secretary and a treasurer, and such other officers as the board of directors may designate. The officers shall be elected by the board of directors immediately after each annual meeting of stockholders, and shall hold office for one year, or until their successors are elected and qualified. Until the first annual meeting the board of directors herein named shall elect the officers of the corporation. The offices of secretary and treasurer may be held by one and the same person if so ordered by the directors.

Article IX.

The highest amount of indebtedness or liability direct or contingent to which this corporation is at any time to subject itself is \$200,000.

Article X.

The private property of the stockholders of this corporation shall be forever exempt from corporate debts.

Article XI.

This corporation does hereby appoint Kenneth B. McMicken of Litchfield Park, Arizona, who has been a bona fide resident of Arizona for at least three years, its lawful agent in and for the State of Arizona for and on behalf of said corporation to accept and acknowledge service of and upon whom may be served all necessary process in any action, suit or proceeding that may be had or brought against said corporation in any court of the State of Arizona.

In Witness Whereof we have hereunto set our hands this 22nd day of Nov., 1943.

A. H. ZIESKE,

KENNETH B. McMICKEN,

W. N. KRING,

H. R. HUNT,

GEORGE REISMANN.

State of Arizona,
County of Maricopa—ss.

The foregoing instrument was acknowledged before me this 20th day of Nov., 1943, by A. H. Zieske,

Kenneth B. McMicken, W. N. Kring, H. R. Hunt
and George Reismann.

[Seal] /s/ W. C. ADAMS,
Notary Public.

My commission expires March 7, 1947.

Endorsement

Arizona Corporation Commission
Incorporating Division

Filed: Nov. 23, 1943, at 11:00 a.m. at the request
of James R. Moore, whose address is 519 Title &
Trust Bldg., Phoenix, Arizona.

G. V. HAYS,
Secretary;

By HELEN PETERS.

(Docket 792, Page 33.)

(Copy)

Amendment to Articles of Incorporation of
Adaman Mutual Water Company

This is to certify that at a special meeting of the
stockholders of the Adaman Mutual Water Com-
pany, a corporation organized and existing under

the laws of the State of Arizona, held at the office of the corporation at Litchfield Park, Arizona, on the 19th day of July, 1951, upon more than thirty days' notice in writing of the proposed meeting, giving the time, place and purpose of said meeting, having been sent to all stockholders, and at which said meeting more than a majority of all stockholders of the corporation owning and representing more than a majority of its issued and outstanding stock, were present in person or by proxy, and by the affirmative votes adopted a resolution authorizing the amendment of Article IV of the Articles of Incorporation of the Adaman Mutual Water Company to read as follows:

“IV.

“The amount of the authorized capital stock of this Corporation shall be (4,500) forty-five hundred shares of no par value and it shall be issued for such consideration in cash, property or service as the Board of Directors may from time to time determine, payable prior to the issuance of certificates therefor.”

And authorizing the amendment of Article IX of the Articles of Incorporation of said corporation to read as follows:

“IX.

“The highest amount of indebtedness or liability, direct or contingent to which this Corporation is at any time to subject itself is \$300,000.00.”

In Witness Whereof the Adaman Mutual Water Company has caused this certificate to be executed and acknowledged by its President and its corporate seal to be affixed and attested by its Secretary on the 6th day of August, 1951.

(Docket 792, Page 34 (rp).)

/s/ A. H. ZIESKE,
President.

Attest:

/s/ W. N. KRING,
Secretary.

State of Arizona,
County of Maricopa—ss.

On this 6th day of August, 1951, before me, the undersigned officer, personally appeared A. H. Zieske, who acknowledged himself to be the President of Adaman Mutual Water Company, a corporation, and that he, as such President, being authorized so to do, executed the foregoing instrument for the purposes therein contained.

In Witness Whereof I have hereunto set my hand and official seal.

/s/ W. C. ADAMS,
Notary Public.

My Commission Expires March 7, 1955.

Arizona Corporation Commission
Incorporating Division

Filed: August 13, 1951, at 11:55 a.m. at request of Moore & Romley, whose address is 519 Title & Trust Bldg., Phoenix, Arizona.

MEL D. MICHAEL,
Secretary;

By E. HABEICH.

EXHIBIT 8

(Copy)

Bylaws of the Adaman Mutual Water Company
(Adopted November 26, 1943)

Article I.

Section 1. The territory within which the lands to be irrigated are situated shall be known as the Adaman Reclamation Project, hereinafter called the Project, and include the lands in such Project as are described in the Articles of Incorporation.

Section 2. Only those who are owners of land, or hold contracts to purchase land within the area of the Project as described in the Articles of Incorporation or within such extension thereof as may be duly made shall be qualified to own shares of this company. One share and no more shall be allotted for each acre of land or major fraction thereof owned or held under contract of purchase by the subscriber.

Section 3. Each share and the holder thereof shall be subject to the conditions of the form of stock subscription and contract herein prescribed, and shall execute such form for the stock subscribed by him, and no subscriptions for stock shall be taken or stock issued unless the applicant shall have executed said form of stock subscription and contract, which shall be signed, executed, and acknowledged by the applicant in the same manner as required for the execution and acknowledgment of deeds of conveyance of real property. Said form of stock subscription and contract shall be as follows:

“Stock Subscription and Contract”

Know All Men by These Presents:

That I,, an unmarried man,
(Or)

We, and,
husband and wife, subscribe for and agree to take
..... shares of stock of Adaman Mutual Water
Company, an Arizona non-profit corporation, hereinafter called the Company, and in conformity with the Articles of Incorporation and the bylaws of said company, now existing or as may be hereafter adopted or amended, and to pay \$1.00 per share therefor, as called by the Board of Directors of said Company, and in consideration of the benefits we receive therefrom covenant and agree as follows:

(1) Said shares of stock and all water rights and interests represented thereby or existing or ac-

cruing therefrom by reason thereof under the Articles of Incorporation or bylaws of said Company or incident thereto, are to be inseparately appurtenant to the following-described real estate, located in Maricopa County, Arizona, viz.:

(2) Ownership of said shares shall entitle the owner thereof to his prorata share of all the water developed or owned by the Company for the irrigation in the Adaman Reclamation Project, as described in Company's Articles of Incorporation, including the above-described lands and for domestic use thereon not exceeding four acre feet per acre year, and further not exceeding the amount of water reasonably necessary for said uses.

(3) It is agreed and understood that the records of the Company, as well as the certificate or other evidence of ownership of the shares of stock in the Company, when issued, shall contain a description of the lands to be irrigated, as above described, and to which the aforesaid rights and shares shall be perpetually appurtenant; and all rights, whatever their source or whatever their manner of acquisition, to the use of water for irrigation of said lands, shall hereafter be forever inseparably appurtenant thereto, together with the said shares of stock and all rights and interests represented thereby or existing or accruing by reason thereof, unless such rights shall become forfeited under the provisions of this contract, or by the bylaws of this Company, or by operation of law; or by the voluntary aban-

donment thereof by deed, grant, or other instrument, or by non-user for the term prescribed by law; but no such abandonment shall be for the benefit of any person designated by the undersigned or his successor, directly or indirectly, or to his use, nor confer any right whatsoever upon the holder of any grant, release, waiver, or declaration of abandonment of any kind.

(4) Every transfer of the title to said lands to which said rights and shares are appurtenant, whether by grant or operation of law (except where the land may be subjected by grant, or involuntarily under any law, to an easement, the exercise of which does not interfere with the cultivation of soil by the servient owner) shall operate, whether it be so expressed therein or not, as a transfer to the grantee or successor in title of all rights to the use of water for the irrigation of said lands, also all rights arising from or incident to the ownership of such shares, as well as the shares themselves, and upon presentation to this Company of proof of any such transfer of land the proper officer shall transfer such shares of stock upon its books to the successor in title to said lands.

(5) Any transfer or attempted transfer of any of the above shares of this company made or suffered by the owner thereof, unless simultaneously a transfer of the land to which they are appurtenant is made or suffered to or in favor of the same party, shall be of no force or effect for any purpose, and shall confer no rights of any kind whatso-

ever on the person or persons to whom such transfer may have been attempted to be made.

(6) Assessments upon said shares and the land to which they are appurtenant may be made from time to time as required for the operation, maintenance, repair, renewal, replacement, improvement, enlargement, or extension of the works owned, controlled, or to be maintained by the Company, and for the construction, acquisition, or control of any works, property, or rights required in connection with the business of the Company and for the fulfillment of any obligation undertaken by it, or for the carrying out of any of its purposes.

The company shall make no assessment upon or against any stock that is appurtenant to land or upon land which has never been in cultivation until such time as said land is brought into cultivation; but before such land shall be entitled to receive water the owner thereof shall make such contribution as the board of directors may deem fair and just to the corporation's capital investment account in order that such owner shall obtain no inequitable advantage over other owners of land in the Project who have paid assessments for the capital investment of the corporation.

(7) Assessments and the subscription price of said shares shall become due from time to time, as they are called or made and levied by the board of directors and be a lien on said lands and shares of stock of the undersigned and his transferee, and all rights and interests represented by said shares.

The payments due for the purchase of said stock and the calls and assessments thereon made by the Company shall be a lien upon the above-described lands and said shares and said lien may be enforced by the Company by a foreclosure and sale of said stock and lands or so much thereof as may be necessary in the manner provided by law for the foreclosure of mortgages, and the purchasers at such sales shall be entitled to the benefit of all payments on account of the subscription price of said stock and to said land and the water rights appurtenant thereto under and by virtue of said stock and shall take said lands and said stock subject to the obligations and conditions herein provided, including the balance unpaid on the purchase of said stock and said assessments; the balance due on subscription price of said stock together with any assessments levied thereon may also be enforced by the withholding of the delivery of water for the irrigation of the above-described land and for domestic use thereon which but for such defaults the undersigned would be entitled to receive for such uses.

(8) The undersigned further grant to the Adaman Mutual Water Company over the lands described herein as may be required in connection with the works at any time owned or controlled or undertaken by the Company for the use and benefit of its stockholders, the necessary rights of way for the construction, operation and maintenance of wells, canals, pipelines, telephone and electrical

transmission lines, drains, dykes and other works for the irrigation, drainage or reclamation of lands in the project, together with the right of ingress and egress thereto and therefrom.

(9) The undersigned furthermore agree to be bound by all the terms, conditions, limitations, and provisions contained in the articles of incorporation and bylaws of said company, including all amendments thereto now existing or which may hereafter be duly adopted.

(10) It is understood and agreed that no stock certificate representing the shares herein subscribed for shall be physically delivered to the undersigned, and that said certificate shall be physically held by the company for the use and benefit of the undersigned and the persons to whom the land to which such shares are made appurtenant may be transferred.

(11) When the masculine or singular is herein used, it may be read and held to mean the feminine or plural as the case may be so as to correspond with the context of this stock subscription and contract.

In Witness Whereof, I have hereunto set my hand and seal this day of, 19....

.....

The above subscription and contract was accepted and approved by the Adaman Mutual Water Com-

pany at a meeting of its Board of Directors held on the day of, 19...

ADAMAN MUTUAL WATER
COMPANY,

By,
President.

Attest:

.,
Secretary.

The foregoing stock subscription and contract shall become binding upon the Company only when approved and executed in its name by its President and its seal thereunto attached and affixed by its secretary and thereupon it shall be a binding contract between the Company and the subscriber.

Section 4. Any shares of stock which may be forfeited under the provisions of the stock subscription and contract, as set forth in Section 3 of Article I of the bylaws, shall at once be canceled and shall not, under any circumstances, be renewed, revived, or reissued. Other stock in lieu thereof up to the limit of the total number of shares authorized by the articles of incorporation may be subscribed for and issued, subject to all the conditions of these bylaws and the articles of incorporation.

Section 5. The amount of water to be delivered to such owner during any irrigation season shall be that proportionate part of all the water available for distribution by the company during that season as the number of shares owned by him shall bear

to the whole number of valid and subsisting shares then outstanding, not exceeding four acre feet per acre per year and reasonably necessary for the irrigation of said lands and for domestic use thereon, such water to be delivered to and upon said lands at such times during that season as may be needed for the proper irrigation thereof.

Section 6. The records of the company, and each and every certificate or other evidence of ownership of the shares of stock in the company, when issued, shall contain a description of the lands to be irrigated, and to which the aforesaid rights and shares shall be perpetually appurtenant; and all rights to the use of water for the irrigation of said lands, whatever their source, or whatever their manner of acquisition, shall be forever inseparably appurtenant thereto, together with the said shares of stock, and all rights and interest represented thereby or existing or accruing by reason thereof, unless such rights shall become forfeited under the provisions of these bylaws, or by operation of law, or by the voluntary abandonment thereof by deed, grant, or other instrument, or by non-user for the term prescribed by law; but no such abandonment shall be for the benefit of any person designated by such shareholder, directly or indirectly, or to his use, nor confer any right whatsoever upon the holder of any grant, release, waiver, or declaration of abandonment of any kind; provided, however, that if for any reason it should at any time become impracticable to beneficially use water for the irrigation

of the land to which the right to the use of the water is appurtenant, the said right may be severed from said land and simultaneously transferred and attached to other lands to which shares of stock in this company are or shall thereby be made appurtenant, if a request for leave to transfer, showing the necessity therefor, shall have first been allowed and approved by the Board of Directors.

Section 7. Revenues necessary for the accomplishment of the purposes of this association shall be raised by call or assessment, from time to time as required, upon and against the shareholders.

Section 8. The Board of Directors shall have power to make and enforce necessary bylaws for fixing and enforcing the lien on the lands of the shareholders, and for making, levying, collecting, and enforcing of all assessments.

Article II.

Section 1. Fiscal and Irrigation Years. The company's fiscal and irrigation years shall run concurrently with the calendar year.

Section 2. Annual Budget and Assessments. On or before the 1st day of December of each year, beginning with the year 1943, the Board of Directors shall make a budget for the ensuing fiscal year in which shall be estimated and itemized the various items of expenditure for the ensuing fiscal year and shall levy a prorata assessment upon each share of the assessable stock of the company and fix the dates and amounts upon which said assessments

shall be paid. The total of the assessments shall equal the company's estimated financial requirements for the ensuing fiscal year plus such additional amount as the Board of Directors may deem prudent to make against any anticipated or probable defaults in the payment by the shareholders of their installments of said assessments when due.

A copy of said budget together with a notice of the amount of assessments for the ensuing fiscal year and the dates of payment of installments thereof shall be mailed to each shareholder prior to the first of the ensuing fiscal year.

Article III.

Corporate Seal. This corporation shall have an official seal consisting of a circle having on the circumference thereof, "Adaman Mutual Water Company," and in the center, "Incorporated, 1943, Arizona," an impression of which is hereto affixed.

Article IV.

Section 1. Election of Officers. Immediately after their election the directors shall meet and organize and elect officers as provided in the Articles of Incorporation.

Section 2. Regular Meetings of Board of Directors. Regular meetings of the Board of Directors shall be held quarterly on the first Tuesday following the first Monday in September, December, March and June of each year at 2:30 o'clock p.m. at the principal office of the corporation unless such Tuesday falls on a holiday, in which event the meet-

ing shall be held on the next day at the same hour in the same place. No notice of regular meetings need be given.

Section 3. Special Meetings of Board of Directors. Special meetings of the Board of Directors may be called by the President whenever he deems it expedient and shall be called by him when requested in writing so to do by a majority of the Board of Directors. It shall be the duty of the Secretary to give notice of the time and place of special meetings of the Board by causing a written notice thereof to be mailed to each Director at his post office address as the same appears on the records of the company at least three days prior to such special meeting or by giving notice personally or by telephone or telegraph to any Director when convenient so to do at least two days prior to such meeting.

Section 4. Quorum. At any meeting of the Board a majority of the Directors shall constitute quorum.

Article V.

Section 1. President. The president shall preside at all meetings of stockholders and directors. He shall sign all certificates of stock and conveyances of real estate, and any other instruments affecting the real estate of the corporation or requiring his signature. He shall countersign all checks drawn against the funds of the corporation. He shall have all the powers and perform all the duties usually incident to the office of president of

a corporation, and shall have such other powers and duties as may be from time to time vested in or assigned to him by the Board of Directors.

Section 2. Vice-President. The Vice-President shall have all the powers and perform all the duties of the president in case of the president's absence or inability to act.

Section 3. Secretary. The secretary shall keep minutes of all meetings of the board of directors and stockholders. Jointly with the president, he shall sign all certificates of stock of the corporation. He shall be the custodian of the company's seal, and shall affix it to all proper instrument. He shall give or cause to be given notices of all meetings of stockholders of the company and of the board of directors. He shall have charge of the stock certificate books, transfer book and stock ledgers, and shall in general perform all the duties incidental to the office of secretary, and such other duties as may be assigned to him by the president or the board of directors.

Section 4. Treasurer. The treasurer shall have custody of all the funds and securities of the corporation; he shall sign all checks and deposit the funds of the corporation to its credit in such bank or banks as the board of directors may designate. Regular books and accounts shall be kept under his direction and supervision, and he shall render statements of such accounts to the president, directors and stockholders when so requested. He shall perform such other duties as may be incident to his

office or that may be assigned to him by the president or the board of directors. He shall give bond, when requested by the board of directors, in such amount and with such surety as they may approve.

Section 5. Assistant Secretary. The board of directors may appoint an assistant secretary, who shall have such powers and perform such duties as may be assigned to him by the board of directors.

Section 6. Assistant Treasurer. The board of directors may appoint an assistant treasurer who shall have such powers and perform such duties as may be assigned to him by the board of directors.

Section 7. Combination of Offices. The offices of secretary and treasurer may be held by one and the same person. The offices of assistant secretary and assistant treasurer may be held by one and the same person.

Article VI.

Section 1. Stock Certificates. Certificates of stock of this corporation shall be in such form as shall be approved by the Board of Directors and shall contain a description of the land to which the water represented by said stock for irrigation and domestic purposes is made appurtenant by the terms of the form of shareholder's "Subscription and Contract" set out in Section 3 of Article I of these bylaws and said certificates shall on their face contain a recital that they are subject to assessments and all provisions of the Articles of Incorporation and these bylaws pertaining to the company's shares of stock.

Section 2. Delivery of Certificates. No certificate for shares of stock of this corporation shall be physically delivered to the shareholder but the Secretary shall hold the same among the records of the corporation for the use and benefit of the shareholder and shall keep a register of all shares issued together with a description of the land to which they and the water represented by them are made appurtenant pursuant to the Articles of Incorporation and these bylaws.

RALPH HUNT,
K. B. McMICKEN,
GEORGE REISMANN,
A. H. ZIESKE,
W. N. KRING,
Directors.

On a motion duly made, seconded and unanimously carried, the following form of stock certificate was adopted:

Incorporated Under the Laws of Arizona
Number: Shares

Adaman Mutual Water Company

Capital Stock 3,000 Shares of No Par Value

This Certifies That, is the owner of shares of stock of no par value of Adaman Mutual Water Company, an Arizona corporation, transferrable only on the books of this corporation, pursuant to the Articles of Incorporation and the corporation's bylaws, and that each

share of stock shall entitle the owner thereof to his proportionate share of all the waters of said corporation not exceeding four acre feet per acre per irrigation year for irrigation and domestic uses on the following-described land located in Maricopa County, Arizona:

to which said land said shares, and the water thereby represented shall be inseparably and perpetually appurtenant as provided in the company's Articles of Incorporation, its bylaws and said stock subscription and contract dated, 194...

The shares represented by this certificate are subject to assessment in the manner provided by the company's Articles of Incorporation, its bylaws and said stock subscription and contract and to all the terms and conditions of each thereof.

In Witness Whereof this corporation has caused this certificate to be signed by its duly authorized officers and its corporate seal to be hereunto affixed this day of, 19...

[Seal],
President.

Attest:
.,
Secretary.

The following resolution was unanimously adopted:

Resolved, That the President of the Company is authorized and directed to negotiate a con-

tract with Goodyear Farms for the purchase of all irrigation and drainage facilities heretofore used in irrigation of the lands included within the Adaman reclamation project, and submit for the approval of the directors of this Company draft contract providing for such purchase.

There being no further business, the Board upon motion adjourned.

W. N. KRING,
Secretary.

Approved:

RALPH HUNT,
GEORGE REISMANN,
K. B. McMICKEN,
A. H. ZIESKE,
W. N. KRING.

EXHIBIT 9

(Copy)

Adaman Mutual Water Company
Stock Subscription and Contract

Know All Men by These Presents:

That we, and,
subscribe for and agree to take shares
of stock of Adaman Mutual Water Company, an

Arizona non-profit corporation, hereinafter called the Company, and in conformity with the Articles of Incorporation and the bylaws of said Company, now existing or as may be hereafter adopted or amended, and to pay per share therefor, as called by the Board of Directors of said Company, and in consideration of the benefits we receive therefrom covenant and agree as follows:

(1) Said shares of stock and all water rights and interests represented thereby or existing or accruing therefrom by reason thereof under the Articles of Incorporation or bylaws of said Company or incident thereto, are to be inseparably appurtenant to the following-described real estate, located in Maricopa County, Arizona, viz.:

(2) Ownership of said shares shall entitle the owner thereof to his prorated share of all the water developed or owned by the Company for the irrigation in the Adaman Reclamation Project, as described in Company's Articles of Incorporation, including the above-described lands and for domestic use thereon not exceeding four acre feet per acre year, and further not exceeding the amount of water reasonably necessary for said use.

(3) It is agreed and understood that the records of the company, as well as the certificates or other evidence of ownership of the shares of stock in the Company, when issued, shall contain a description of the lands to be irrigated, as above described, and to which the aforesaid rights and shares shall be

perpetually appurtenant; and all rights, whatever their source or whatever their manner of acquisition, to the use of water for irrigation of said lands, shall hereafter be forever inseparably appurtenant thereto, together with the said shares of stock and all rights and interests represented thereby or existing or accruing by reason thereof, unless such rights shall become forfeited under the provisions of this contract, or by the bylaws of this Company, or by operation of law; or by the voluntary abandonment thereof by deed, grant, or other instrument, or by non-user for the term prescribed by law; but no such abandonment shall be for the benefit of any person designated by the undersigned or his successor, directly or indirectly, or to his use, nor convey any right whatsoever upon the holder of any grant, release, waiver, or declaration or abandonment of any kind.

(4) Every transfer of the title to said lands to which said rights and shares are appurtenant, whether by grant or operation of law (except where the land may be subjected by grant, or involuntarily under any law, to an easement, the exercise of which does not interfere with the cultivation of soil by the servient owner) shall operate, whether it be so expressed therein or not, as a transfer to the grantee or successor in title of all rights to the use of water for the irrigation of said lands, also all rights arising from or incident to the ownership of such shares, as well as the shares themselves, and upon presentation to the Company of proof of any such

transfer of land the proper officer shall transfer such shares of stock upon its books to the successors in title to said lands.

(5) Any transfer or attempted transfer of any of the above shares of this company made or suffered by the owner thereof, unless simultaneously a transfer of the land to which they are appurtenant is made or suffered to or in favor of the same party, shall be of no force or effect for any purpose, and shall confer no rights of any kind whatsoever on the person or persons to whom such transfer may have been attempted to be made.

(6) Assessments may be made from time to time as required for the operation, maintenance, repair, renewal, replacement, improvement, enlargement, or extension of the works owned, controlled, or to be maintained by the Company, and for the construction, acquisition, or control of any works, property, or rights required in connection with the business of the Company and for the fulfillment of any obligation undertaken by it, or for the carrying out of any of its purposes.

The Company shall make no assessment upon or against any stock that is appurtenant to land which has never been in cultivation until such time as said land is brought into cultivation; but before such land shall be entitled to receive water the owner thereof shall make such contribution as the Board of Directors may deem fair and just to the Corporation's capital investment account in order

that such owner shall obtain no inequitable advantage over other owners of land in the Project who have paid assessments for the capital investment of the corporation.

(7) Assessments and the subscription price of said shares shall become due from time to time, as they are called or made and levied by the Board of Directors and be a lien on said lands and shares of stock of the undersigned and his transferee, and all rights and interests represented by said shares.

The payments due for the purchase of said stock and the calls and assessments thereon made by the Company shall be a lien upon the above-described lands and said shares and said lien may be enforced by the Company for a foreclosure and sale of said stock and lands or so much thereof as may be necessary in the manner provided by law for the foreclosure of mortgages, and the purchasers at such sales shall be entitled to the benefit of all payments on account of the subscription price of said stock and to said land and the water rights appurtenant thereto under and by virtue of said stock and shall take said lands and said stock subject to the obligations and conditions herein provided, including the balance unpaid on the purchase of said stock and said assessments; the balance due on subscription price of said stock together with any assessments levied thereon may also be enforced by the withholding of the delivery of water for the irrigation of the above-described land and for domestic use thereon which but for

such defaults the undersigned would be entitled to receive for such uses.

(8) The undersigned further grant to the Adaman Mutual Water Company over the lands described herein as may be required in connection with the works at any time owned or controlled or undertaken by the Company for the use and benefit of its stockholders, the necessary rights of way for the construction, operation and maintenance of wells, canals, pipelines, telephone and electrical transmission lines, drains, dykes and other works for the irrigation, drainage or reclamation of lands in the project, together with the right of ingress and egress thereto and therefrom.

(9) The undersigned furthermore agree to be bound by all the terms, conditions, limitations, and provisions contained in the Articles of Incorporation and bylaws of said Company, including all amendments thereto now existing or which may hereafter be duly adopted.

(10) It is understood and agreed that no stock certificate representing the shares herein subscribed for shall be physically delivered to the undersigned, and that said certificate shall be physically held by the Company for the use and benefit of the undersigned and the persons to whom the land to which such shares are made appurtenant may be transferred.

(11) When the masculine or singular is herein used, it may be read and held to mean the feminine

or plural as the case may be so as to correspond with the context of this stock subscription and contract.

In Witness Whereof, we have hereunto set our hands and seals this day of

.....

.....

State of Arizona,
County of Maricopa—ss.

This instrument was acknowledged before me this day of, by and

In witness whereof, I have hereunto set my hand and affixed my notarial seal the day and year last above written.

.....,

Notary Public.

My commission expires:

The above subscription and contract was accepted and approved by the Adaman Mutual Water Company at a meeting of its Board of Directors held on the day of

**ADAMAN MUTUAL WATER
COMPANY,**

By,
President.

Attest:

.....,

Secretary.

[Endorsed]: Filed July 24, 1954.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between the United States of America, hereinafter called the plaintiff, and John L. Roach and Bettie Jo Roach, husband and wife, hereinafter called the defendants, that:

Whereas, action in condemnation was commenced in the above Court on November 27, 1953, by the filing of a declaration of taking and a complaint in condemnation on behalf of the United States of America at the request of the Under Secretary of the Air Force, and

Whereas, the defendants have contracted to purchase the following-described parcel of real estate by virtue of a certain agreement made and executed by Goodyear Farms, a corporation, Seller, and petitioners as Buyers, dated March 6, 1948, recorded March 8, 1948, in Docket 163, page 446, Records of Maricopa County, Arizona:

Tract No. 115

The South half of the Southeast quarter ($S\frac{1}{2}$ SE $\frac{1}{4}$) of Section Seven (Sec. 7), Township Two North (T 2 N), Range One West (R 1 W), Gila and Salt River Meridian, County of Maricopa, State of Arizona.

Excepting all of that certain strip of land approximately 45 feet wide, designated as a

drainage ditch, and more particularly described in a quitclaim deed from Goodyear Farms to Adaman Mutual Water Company, recorded August 4, 1953, in Docket 1180, page 528, in the office of the County Recorder of said County, lying within the boundaries of the above-described land.

Containing 78.64 acres, more or less, including 3.94 acres, more or less, in Street.

and under the provisions of the Declaration of Taking Act (46 Stat. 1421) the title to the lands above described in fee simple, subject to existing easements for public roads and highways, public utilities, railroads and pipelines, vested in the United States of America, and the right to just compensation for the same was likewise, under the provisions of said Act, vested in the persons entitled thereto, and

Whereas, John L. Roach and Bettie Jo Roach, husband and wife, were the contract purchasers of the above-described land as aforesaid.

Now, Therefore, it is hereby stipulated and agreed by and between the above-named parties that the sum of Fifty-one Thousand Ten and No/100 (\$51,010.00) Dollars, inclusive of interest, is the just compensation in full to be paid by the plaintiff for the taking and condemnation of the unencumbered fee simple title to the lands hereinbefore described, together with all improvements thereunto belonging, including crop damage and damage, if

any, to any remaining land owned by the defendants, subject only to such easements as may be or have been waived by plaintiff.

It is further stipulated and agreed by and between the above-named parties that the aforesaid sum shall be paid to John L. Roach and Bettie Jo Roach, husband and wife, and that from said sum there shall first be paid any and all liens, balance due on contract for purchase, taxes and encumbrances against said land, including adverse claims or claims by lessees.

The defendants, John L. Roach and Bettie Jo Roach, husband and wife, hereby enter their appearance in this action and expressly waive service of summons, petition and any and all other process and all right to a hearing on the petition and pleadings filed in this action and the right to the appointment of Commissioners or Jury for the determination of just compensation.

The above-named parties hereby agree to the entering of a judgment in conformity with this stipulation, fixing the value of the land hereinbefore described as recited herein, and setting forth the conditions and provisions of this stipulation.

Executed on the 7th day of April, 1954.

/s/ JOHN L. ROACH,

/s/ BETTIE JO ROACH,

Defendants.

UNITED STATES OF
AMERICA,

JACK D. H. HAYS,

United States Attorney;

/s/ EVERETT L. GORDON,

Assistant United States
Attorney.

[Endorsed]: Filed Aug. 16, 1954.

[Title of District Court and Cause.]

JUDGMENT IN RE TRACT 115

This cause coming on regularly to be heard before the Court upon the Stipulation between the defendants, John L. Roach and Bettie Jo Roach, husband and wife, and the plaintiff, United States of America, and

It appearing to the Court that the sum of \$50,-010.00 has been deposited in the Registry of this Court as estimated just compensation for the following-described real estate:

Tract No. 115

The South half of the Southeast quarter (S $\frac{1}{2}$ SE $\frac{1}{4}$) of Section Seven (Sec. 7), Township Two North (T 2 N), Range One West (R 1 W), Gila and Salt River Meridian, County of Maricopa, State of Arizona.

Excepting all of that certain strip of land, approximately 45 feet wide, designated as a drainage ditch, and more particularly described

in a quitclaim deed from Goodyear Farms to Adaman Mutual Water Company, recorded August 4, 1953, in Docket 1180, page 528, in the office of the County Recorder of said County, lying within the boundaries of the above-described land.

Containing 78.64 acres, more or less, including 3.94 acres, more or less, in Street.

It Is Ordered, Adjudged and Decreed that the reasonable just compensation for the taking of the unencumbered fee simple title, subject to existing easements for public roads and highways, public utilities, railroads and pipelines, to the lands hereinabove described is the sum of \$50,010.00, inclusive of interest, and that title in fee simple to said lands is now vested in the United States of America, and is hereby confirmed and held to be in the United States of America.

It Is Further Ordered, Adjudged and Decreed that said sum having been paid to said defendants pursuant to orders entered herein on January 18, 1954; June 9, 1954, and June 22, 1954, that the award and judgment hereby rendered in favor of said defendants be, and the same is fully discharged, paid and satisfied.

Done in Open Court this 16th day of August, 1954.

/s/ JAMES A. WALSH,
Judge, United States District Court for the District of Arizona.

[Endorsed]: Filed Aug. 16, 1954.

[Title of District Court and Cause.]

MOTION

Comes Now Jack D. H. Hays, United States Attorney for the District of Arizona, and Everett L. Gordon, Assistant U. S. Attorney for said District, attorneys for the plaintiff, and move that the Judgment entered herein on August 16, 1954, be amended and represent to the Court as the basis for said motion the following:

Said Judgment entered on August 16, 1954, contained a typographical error in two places, in that the sum of \$50,010 appears therein as the sum deposited in the Registry of the Court as the estimated just compensation for the taking of Tract 115, and the sum of \$50,010 was ordered, adjudged and decreed to be the reasonable just compensation for the taking of said parcel; whereas the sum deposited is \$51,010 and the sum ordered adjudged and decreed to be the reasonable just compensation should be \$51,010.

JACK D. H. HAYS,

United States Attorney;

/s/ EVERETT L. GORDON,

Assistant U. S. Attorney.

[Endorsed]: Filed Sept. 1, 1954.

[Title of District Court and Cause.]

AMENDED JUDGMENT IN RE TRACT 115

This cause coming on regularly to be heard before the Court upon the Stipulation between the defendants, John L. Roach and Bettie Jo Roach, husband and wife, and the plaintiff, United States of America, and

It appearing to the Court that the sum of \$51,-010.00 has been deposited in the Registry of this Court as estimated just compensation for the following-described real estate:

Tract No. 115

The South half of the Southeast quarter ($S\frac{1}{2}$ $SE\frac{1}{4}$) of Section Seven (Sec. 7), Township Two North (T 2 N), Range One West (R 1 W), Gila and Salt River Meridian, County of Maricopa, State of Arizona.

Excepting all of that certain strip of land, approximately 45 feet wide, designated as a drainage ditch, and more particularly described in a quitclaim deed from Goodyear Farms to Adaman Mutual Water Company, recorded August 4, 1953, in Docket 1180, page 528, in the Office of the County Recorder of said County, lying within the boundaries of the above-described land.

Containing 78.64 acres, more or less, including 3.94 acres, more or less, in Street.

It Is Ordered, Adjudged and Decreed that the reasonable just compensation for the taking of the unencumbered fee simple title, subject to existing easements for public roads and highways, public utilities, railroads and pipelines, to the lands hereinabove described is the sum of \$51,010.00, inclusive of interest, and that title in fee simple to said lands is now vested in the United States of America, and is hereby confirmed and held to be in the United States of America.

It Is Further Ordered, Adjudged and Decreed that said sum having been paid to said defendants pursuant to orders entered herein on January 18, 1954; June 9, 1954, and June 22, 1954, that the award and judgment hereby rendered in favor of said defendants be, and the same is fully discharged, paid and satisfied.

Done in Open Court this 1st day of Sept., 1954.

/s/ JAMES A. WALSH,

Judge, United States District Court for the District of Arizona.

[Endorsed]: Filed Sept. 1, 1954.

[Title of District Court and Cause.]

OBJECTIONS TO MOTION OF ADAMAN
MUTUAL WATER COMPANY, A COR-
PORATION, AND ITS STOCKHOLDERS
TO INTERVENE

Now Comes the plaintiff, United States of America, by Jack D. H. Hays, United States Attorney

for the District, and Everett L. Gordon, Assistant United States Attorney for said District, and files objections to Adaman Mutual Water Company, a corporation, and its stockholders being allowed to intervene; which objections are as follows:

1. The parties seeking intervention have not alleged any of the essential grounds for intervention as set forth in Rule 24 of the Federal Rules of Civil Procedure for the United States District Courts.

2. The Court is without jurisdiction to give the relief sought because the parties seeking intervention are in effect attempting to make a counterclaim against the United States of America in that they seek a judgment compelling payment of just compensation for property not included in the Declaration of Taking.

3. Rule 71-A of the Federal Rules of Civil Procedure for the United States District Courts establishing procedure in condemnation of property in Section (e) thereof precludes any pleading other than Complaint and Answer thereto.

4. The allegation that intervention is the only procedure by and under which relief can be had is without merit.

JACK D. H. HAYS,
United States Attorney for
the District of Arizona;

/s/ EVERETT L. GORDON,
Assistant United States
Attorney.

Mailed copy of aforesaid Objections to Motion, together with Memorandum of Authorities in Support Thereof to: Snell & Wilmer, Mayer-Heard Building, Phoenix, Arizona, Attorneys for Parties Seeking Intervention this 1st day of December, 1954.

/s/ EVERETT L. GORDON,
Assistant United States
Attorney.

[Endorsed]: Filed Dec. 1, 1954.

[Title of District Court and Cause.]

MINUTE ENTRY OF
MONDAY, JANUARY 24, 1955

Honorable Dave W. Ling, United States District
Judge, Presiding.

Motion for Intervention of Adaman Mutual Water Co., et al., comes on regularly for hearing this day. Everett Gordon, Esq., Assistant United States Attorney, appears for the plaintiff. Mark Wilmer, Esq., and Edward Jacobson, Esq., are present for the Interveners. Said motion is now argued.

It Is Ordered that the record show Intervener is allowed 15 days to file Memorandum and Government 15 days to answer and that said motion shall thereupon stand submitted.

[Title of District Court and Cause.]

AMENDMENT TO COMPLAINT

Plaintiff hereby amends its complaint filed herein on November 27, 1953, in the following manner and in these particulars only:

1. Delete the legal description of Tract No. 117 on page 3 of Schedule "A" of said complaint, and insert in lieu thereof the following legal description for said Tract No. 117:

That portion of the South half of the Southwest quarter ($S\frac{1}{2}$ $SW\frac{1}{4}$) of Section Seven (Sec. 7), Township Two North (T 2 N), Range One West (R 1 W), Gila and Salt River Meridian, Maricopa County, State of Arizona, described as follows, basis of bearings being transverse Mercator Grid, Central Zone, Arizona;

Beginning at the South $\frac{1}{4}$ corner of said Section 7; thence along the East line of said Southwest $\frac{1}{4}$ of Section 7 North $0^{\circ} 00' 28''$ West 541.18 feet, more or less, to a line which bears South $42^{\circ} 48' 58''$ West from a point in the East line of said Section 7, said point being distant North $0^{\circ} 01' 46''$ East 753.11 feet from the East $\frac{1}{4}$ corner of said Section; thence Southwesterly along the said line bearing South $42^{\circ} 48' 58''$ West, a distance of 736.60 feet, more or less, to the South line of said Section 7; thence along said South line South $89^{\circ} 54' 08''$ East 500.70 feet, more or less, to the point of beginning. Containing 3.11 acres,

more or less, including 0.74 acre, more or less, in streets.

2. Delete the legal description of Tract No. 118 on page 4 of Schedule "A" of said complaint, and insert in lieu thereof the following legal description for said Tract No. 118:

The East 812.06 feet of the Northeast Quarter of the Northwest Quarter ($NE\frac{1}{4}$ $NW\frac{1}{4}$) of Section 18 (Sec. 18), Township Two North (T 2 N), Range One West (R 1 W), Gila and Salt River Meridian in the County of Maricopa, State of Arizona.

Containing 24.61 acres, more or less, including 1.59 acres, more or less in streets, reserving, however, an easement upon approximately .78 acre thereof (hereinafter described) to Adaman Mutual Water Company, an Arizona corporation, its successors and assigns, for an underground irrigation pipeline, in, on, over and across said .78 acre, together with the absolute right at all times of ingress and egress thereto, and the right to go upon said .78 acre with men and equipment in order to repair, replace, maintain and construct, and otherwise attend the said underground irrigation pipeline for which said easement is granted; a description of said .78 acre upon which said easement is granted is as follows:

A strip of land 20 feet in width lying 10 feet on each side of the following-described center line, basis of bearings being transverse Mercator Grid, Central Zone, Arizona.

Beginning at a point distant Westerly 510.23 feet along the North line of said Section 18, from the North quarter section corner of said section; thence South $42^{\circ} 48' 58''$ West 361.05 feet, more or less, to a point; thence Southeasterly along a line bearing South $47^{\circ} 11' 02''$ East, a distance of 968.70 feet, more or less, to a point in a line parallel to on the West 45 feet distant from the N-S Midsection line of said Section 18; thence southerly along said line bearing South $0^{\circ} 03' 12''$ East distance of 371.78 feet, more or less, to the South line of the Northeast quarter of the Northwest quarter ($NE\frac{1}{4}$ $NW\frac{1}{4}$) of said Section 18, the point of ending.

Containing 0.78 acres, more or less.

The purpose of this amendment being to increase the acreage of Tract No. 117 from approximately 2.76 acres to 3.11 acres, and to increase the acreage of Tract No. 118 from approximately 9.40 acres to 24.61 acres, pursuant to stipulations entered into by and between plaintiff and the parties interested in said Tracts.

JACK D. H. HAYS,

United States Attorney, for
the District of Arizona;

/s/ EVERETT L. GORDON,

Assistant United States
Attorney.

[Endorsed]: Filed May 13, 1955.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the United States of America, hereinafter called the plaintiff, and Goodyear Farms, a corporation, and Ralph Ashby and Grace Ashby, husband and wife, hereinafter called the defendants, that:

Whereas, action in condemnation was commenced in the above Court on November 27, 1953, by the filing of a Declaration of Taking and a Complaint in condemnation on behalf of the United States of America at the request of the Under Secretary of the Air Force; and

Whereas, the defendants, Ralph Ashby and Grace Ashby, husband and wife, having contracted to purchase a parcel of real estate, including the lands described herein, by virtue of a certain agreement made and executed by Goodyear Farms, a corporation, Seller, and said defendants, as Buyers, dated March 8, 1947, recorded March 13, 1947, in Book 113 of Agreements at pages 249-254, inclusive, Records of Maricopa County, Arizona, and

Whereas, the Complaint aforementioned has been filed to condemn the following-described premises:

Tract No. 117

That portion of the South half of the Southwest quarter ($S\frac{1}{2}$ $SW\frac{1}{4}$) of Section Seven

(Sec. 7), Township Two North (T 2 N), Range One West (R 1 W), Gila and Salt River Meridian, Maricopa County, State of Arizona, described as follows, basis of bearings being transverse Mercator Grid, Central Zone, Arizona;

Beginning at the South $\frac{1}{4}$ corner of said Section 7; thence along the East line of said Southwest $\frac{1}{4}$ of Section 7 North $0^{\circ} 00' 18''$ East 509.38 feet, more or less, to a line which bears South $42^{\circ} 48' 58''$ West from a point in the East line of said Section 7, said point being distant North $0^{\circ} 01' 46''$ East 753.11 feet from the East $\frac{1}{4}$ corner of said Section; thence Southwesterly along the said line bearing South $42^{\circ} 48' 58''$ West, a distance of 694.41 feet, more or less, to the South line of said Section 7; thence along said South line East 471.92 feet, more or less, to the point of beginning.

Containing 2.76 acres, more or less, including 0.70 acre, more or less, in streets.

and under the provisions of the Declaration of Taking Act (46 Stat. 1421), the title to the lands above described in fee simple, subject to existing easements for public roads and highways, public utilities, railroads and pipelines, vested in the United States of America, and the right to just compensation for the same was likewise, under the provisions of said Act, vested in the persons entitled thereto, and

Whereas, plaintiff contemplates amending its Complaint or filing an amendment thereto condemning the following-described property:

Tract No. 117

That portion of the South half of the Southwest quarter ($S1\frac{1}{2}$ $SW1\frac{1}{4}$) of Section Seven (Sec. 7), Township Two North (T 2 N), Range One West (R 1 W), Gila and Salt River Meridian, Maricopa County, State of Arizona, described as follows, basis of bearings being transverse Mercator Grid, Central Zone, Arizona;

Beginning at the South $\frac{1}{4}$ corner of said Section 7; thence along the East line of said Southwest $\frac{1}{4}$ of Section 7 North $0^{\circ} 00' 28''$ West 541.18 feet, more or less, to a line which bears South $42^{\circ} 48' 58''$ West from a point in the East line of said Section 7, said point being distant North $0^{\circ} 01' 46''$ East 753.11 feet from the East $\frac{1}{4}$ corner of said Section; thence Southwesterly along the said line bearing South $42^{\circ} 48' 58''$ West, a distance of 736.60 feet, more or less, to the South line of said Section 7; thence along said South line South $89^{\circ} 54' 08''$ East 500.70 feet, more or less, to the point of beginning.

Containing 3.11 acres, more or less, including 0.74 acre, more or less, in streets,

and

Whereas, Ralph Ashby and Grace Ashby, husband and wife, are the contract purchasers of the above-described land, and

Whereas the sum of \$2,965.00 has been deposited by the plaintiff in the Registry of the Court as compensation for the first described tract containing 2.76 acres, more or less.

Now, Therefore, It Is Hereby Stipulated and Agreed by and between the above-named parties that the sum of \$3,140.00, plus interest as herein-after set forth is just compensation in full to be paid by the plaintiff for the taking and condemnation of the unencumbered fee simple title to the lands hereinbefore described, containing 3.11 acres, more or less, including 0.74 acres, more or less, in streets, together with all improvements thereunto belonging, including crop damage and damage to the remaining land owned by the defendants, subject only to such easements as may be or have been waived by plaintiff; that from the aforesaid sum the plaintiff has already paid to the defendants on February 4, 1954, the sum of \$2,520.25 and that the remaining \$619.75 shall be paid as follows:

(1) To Goodyear Farms, a corporation, Ralph Ashby and Grace Ashby, husband and wife, the sum of \$587.60, plus \$0.06529 interest per day after July 24 until the date of judgment. It is agreed that from said sum there shall first be paid any and all liens, balance due on taxes and remaining en-

cumbrances against said land, including adverse claims or claims by lessees.

(2) To Adaman Mutual Water Company, a corporation, the sum of \$32.15, plus \$0.00349 per day after July 24, 1954, until the date of judgment.

The above-stated compensation is to be made by the plaintiff without prejudice to any rights or claims which Adaman Mutual Water Company, Goodyear Farms, a corporation; Ralph Ashby and Grace Ashby, husband and wife, may have arising out of a certain Petition for Intervention which has been filed with the Clerk of the Court in the above-entitled cause on or about July 24, 1954.

It Is Further Stipulated and Agreed that the complaint in condemnation, declaration of taking and all pleadings and orders filed in this proceeding may be considered amended in accordance with this Stipulation and that a judgment will be entered in the above-entitled cause for the payment of the sum of \$3,140.00, plus interest as above recited, for the just compensation in full to be paid by the plaintiff for the taking in condemnation of the unencumbered fee simple title to the lands above described containing 3.11 acres, more or less, together with all improvements thereunto belonging, including crop damage and damage to the remaining land owned by the defendants, subject only to such easements as may be or have been waived by the plaintiff, and said judgment shall provide, among other things, for the deposit of additional

funds into the Registry of the Court to satisfy the same.

The defendants, Goodyear Farms, a corporation; Ralph Ashby and Grace Ashby, husband and wife, hereby enter their appearance in this action and expressly waive service of summons, petition and any and all other process and all right to a hearing on the petition and pleadings filed in this action and right to the appointment of commissioners or the selection of a jury for the determination of just compensation for said tract.

The above-named parties hereby agree to the entering of a judgment in conformity with this Stipulation, fixing the value of the land hereinbefore described as recited herein, and setting forth the conditions and provisions of this Stipulation.

Executed on the 14th day of February, 1955.

[Seal] GOODYEAR FARMS,
 An Arizona Corporation;

By /s/ R. W. LITCHFIELD,
 President.

Attest:

/s/ W. N. KRING,
 Asst. Secretary.

/s/ RALPH ASHBY,
/s/ GRACE ASHBY,
 Defendants.

UNITED STATES OF
AMERICA,
Plaintiff.

JACK D. H. HAYS,
United States Attorney for
the District of Arizona;

/s/ EVERETT L. GORDON,
Assistant United States
Attorney.

[Endorsed]: Filed May 13, 1955.

[Title of District Court and Cause.]

JUDGMENT IN RE TRACT No. 117

This cause coming on regularly to be heard before the Court upon a stipulation entered into by and between the defendants, Ralph Ashby and Grace Ashby, his wife, and the plaintiff, United States of America, and

It appearing to the Court that the sum of \$2,965.00 has been deposited in the Registry of the Court as estimated just compensation for the taking of the following-described real estate:

That portion of the South half of the Southwest quarter ($S\frac{1}{2}SW\frac{1}{4}$) of Section Seven (Sec. 7), Township Two North (T2N), Range One West (R1W), Gila and Salt River Meridian, Maricopa County, State of Arizona, de-

scribed as follows, basis of bearings being transverse Mercator Grid, Central Zone, Arizona:

Beginning at the South $\frac{1}{4}$ corner of said Section 7; thence along the East line of said Southwest $\frac{1}{4}$ of Section 7 North $0^{\circ} 00' 18''$ East 509.38 feet, more or less, to a line which bears South $42^{\circ} 48' 58''$ West from a point in the East line of said Section 7, said point being distant North $0^{\circ} 01' 46''$ East 753.11 feet from the East $\frac{1}{4}$ corner of said Section; thence Southwesterly along the said line bearing South $42^{\circ} 48' 58''$ West, a distance of 694.41 feet, more or less, to the South line of said Section 7; thence along said South line East 471.92 feet, more or less, to the point of beginning.

Containing 2.76 acres, more or less, including 0.70 acre, more or less, in streets.

and

It further appearing to the Court that the plaintiff has paid from said funds on deposit in the Registry of the Court to the defendants the sum of \$2,520.25, leaving on deposit in the Registry of the Court the sum of \$444.75, and

It further appearing to the Court that the plaintiff has amended its complaint condemning the following described property:

That portion of the South half of the Southwest quarter ($S\frac{1}{2}SW\frac{1}{4}$) of Section Seven (Sec. 7) Township Two North (T2N), Range

One West (R1W), Gila and Salt River Meridian, Maricopa County, State of Arizona, described as follows, basis of bearings being transverse Mercator Grid, Central Zone, Arizona;

Beginning at the South $\frac{1}{4}$ corner of said Section 7; thence along the East line of said Southwest $\frac{1}{4}$ of Section 7 North $0^{\circ} 00' 28''$ West 541.18 feet, more or less, to a line which bears South $42^{\circ} 48' 58''$ West from a point in the East line of said Section 7, said point being distant North $0^{\circ} 01' 46''$ East 753.11 feet from the East $\frac{1}{4}$ corner of said Section; thence Southwesterly along the said line bearing South $42^{\circ} 48' 58''$ West, a distance of 736.60 feet, more or less, to the South line of said Section 7; thence along said South line South $89^{\circ} 54' 08''$ East 500.70 feet, more or less, to the point of beginning.

Containing 3.11 acres, more or less, including 0.74 acre, more or less, in streets.

It Is Ordered, Adjudged and Decreed that:

(1) The sum of \$3,140.00 plus interest at \$0.06878 per day from July 24, 1954, until paid is the reasonable and just compensation to be paid in full for the unencumbered fee simple title to the 3.11 acres of land, more or less, including 0.74 acre, more or less, in streets, which is above described on Page 2 herein, together with all improvements thereunto belonging, subject to existing easements

for public roads and highways, public utilities and pipelines;

(2) That the plaintiff is ordered and directed to pay into the Registry of this Court for the persons entitled thereto the sum of \$175.00, and in addition thereto sufficient funds for the payment of interest at \$0.06878 per day from July 24, 1954, until paid.

(3) That simultaneously upon the payment by the plaintiff of the sums set out herein in Paragraph 2, all valid liens and claims of whatsoever nature against said lands shall be transferred from said lands to the funds so deposited in the Registry of this Court to the end that the United States of America will take an unencumbered fee simple title to the whole of said 3.11 acres, more particularly described on Page 2 herein, free and discharged of all liens and claims whatsoever.

(4) That the defendants, Goodyear Farms, a corporation, and Ralph Ashby and Grace Ashby, husband and wife, shall have judgment against the plaintiff as and for compensation for the taking of said Tract No. 117, as described on Page 2 herein, subject to the prior claims, rights, interest, equities and liens, if any, of such other persons as the Court shall hereafter find and determine to have any compensable interest in said tract, which rights and interests by this judgment are transferred to and imposed upon the funds to be deposited by the plaintiff in satisfaction of the award herein fixed and ordered to be paid.

(5) That the judgment against said plaintiff shall be in the amount set out in Paragraph 2; that the respective rights of the defendants, Goodyear Farms and Ralph Ashby and Grace Ashby, husband and wife, and others to participate in and their respective shares of said award are to be determined by the subsequent order of the Court.

(6) This Court retains jurisdiction for the purpose of entertaining such further orders and decrees as may be necessary in the premises including an adjudication of the rights of the respective claimants in and to the funds to be deposited in the Registry of this Court by the plaintiff in satisfaction of the award herein made.

Dated this 13th day of May, 1955.

/s/ DAVE W. LING,
Judge, United States District Court, for the District of Arizona.

[Endorsed]: Filed May 13, 1955.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the United States of America, hereinafter called the plaintiff, Goodyear Farms, a corporation, and Bill W. Mullins, defendants, that:

Whereas, an action in condemnation was commenced in the above Court on November 27, 1953,

by the filing of a Declaration of Taking and Complaint on behalf of plaintiff at the request of the Under Secretary of the Air Force; and

Whereas, the defendant, Bill W. Mullins, was the lessee of a certain parcel of land, hereinafter described, the title to which was held in fee by Goodyear Farms by virtue of a certain deed made and executed by Valley Ranch Company, a corporation, dated June 30, 1931, and recorded December 1, 1931, in Book 262 of Deeds, at pages 15 to 18, inclusive, in the Records of Maricopa County, Arizona, and

Whereas, said property so held and leased is more particularly described in said condemnation as follows:

Tract No. 118

That portion of the Northeast quarter of the Northwest quarter ($NE\frac{1}{4}NW\frac{1}{4}$) of Section Eighteen (Sec. 18), Township Two North (T2N), Range One West (R1W), Gila and Salt River Meridian, County of Maricopa, State of Arizona, described as follows, basis of bearings being transverse Mercator Grid, Central Zone, Arizona:

Beginning at the North $\frac{1}{4}$ corner of said Section 18; thence along the North line of said Section West 471.92 feet, more or less, to a line which bears South $42^{\circ} 48' 58''$ West from a point in the East line of Section 7 of said

Township and Range, said point being distant North $0^{\circ} 01' 46''$ East 753.11 feet from the East $\frac{1}{4}$ corner of said Section 7; thence Southwesterly along the said line bearing South $42^{\circ} 48' 58''$ West, a distance of 375.03 feet, more or less, to a point distant South $42^{\circ} 48' 58''$ West 4953.45 feet from said point in the East line of Section 7; thence South $47^{\circ} 11' 02''$ East 990.82 feet, more or less, to the East line of said Northwest $\frac{1}{4}$ of Section 18; thence along said East line North 948.51 feet, more or less, to the point of beginning.

Containing 9.40 acres, more or less, including 1.05 acres, more or less, in streets.

and under the provisions of the Declaration of Taking Act (46 Stat. 1421), the title to the lands above described in fee, subject to existing easements for public roads and highways, public utilities, railroads and pipelines, vested in the plaintiff, and the right to just compensation for the same was likewise, under the provisions of said Act, vested in the persons entitled thereto, and

Whereas, the plaintiff contemplates that it will amend its complaint to condemn the following described property:

Tract No. 118

The East 812.06 feet of the Northeast Quarter of the Northwest Quarter ($NE\frac{1}{4}NW\frac{1}{4}$) of Section 18 (Sec. 18), Township Two North (T2N), Range One West (R1W), Gila and

Salt River Meridian in the County of Maricopa, State of Arizona.

Containing 24.61 acres, more or less, including 1.59 acres, more or less, in streets,

reserving however, to Adaman Mutual Water Company, an Arizona non-profit corporation, its successors and assigns, an easement for an underground irrigation pipeline in, on, over and across the land hereafter particularly described, together with the absolute right at all times of ingress and egress thereto, and the right to go upon said lands with men and equipment in order to repair, replace, maintain and construct, and otherwise attend the said underground irrigation pipeline for which this easement is granted, to wit:

A strip of land 20 feet in width lying 10 feet on each side of the following described center line, basis of bearings being transverse Mercator Grid, Central Zone, Arizona.

Beginning at a point distant Westerly 510.23 feet along the North line of said Section 18, from the North quarter section corner of said section; thence South $42^{\circ} 48' 58''$ West 361.05 feet, more or less, to a point; thence Southeasterly along a line bearing South $47^{\circ} 11' 02''$ East, a distance of 968.70 feet, more or less, to a point in a line parallel to on the West 45 feet distant from the N-S Mid-section line of said Section 18; thence southerly along said line bearing South $0^{\circ} 03' 12''$ East distance of

371.78 feet, more or less, to the South line of the Northeast quarter of the Northwest quarter ($NE\frac{1}{4}NW\frac{1}{4}$) of said Section 18, the point of ending.

Containing 0.78 acres, more or less.

The side lines of the above described strip are to be prolonged or shortened so as to terminate in the lines in which the center line begins and ends.
and

Whereas, Goodyear Farms is the owner in fee of the land described in the preceding paragraph of this Stipulation, and

Whereas, the sum of \$8,370.00 has been deposited by the plaintiff in the Registry of the Court for the taking of the first described tract, containing 9.4 acres, more or less.

Now, Therefore, It Is Stipulated and Agreed by and between the above named parties that the sum of \$14,100.00, plus interest as hereinafter set forth, is just compensation in full to be paid by the plaintiff for the taking in condemnation of the unencumbered fee simple title to the lands hereinbefore described containing 24.61 acres, more or less, including 1.59 acres, more or less, in streets, together with all improvements thereunto belonging, including crop damage and remaining land owned by the defendants, subject only to such easements as may be or have been waived by plaintiff, that the aforementioned sum plus interest shall be paid as follows:

(1) To Goodyear Farms the sum of \$12,224.56, plus \$1.3583 interest per day from July 24, 1954, until the date of judgment. It is understood and agreed that from said sum there shall first be paid any and all liens or balance due on taxes, or remaining encumbrances against said land including adverse claims or claims by lessees.

(2) To Adaman Mutual Water Company, the sum of \$1,875.44, plus \$.2037 interest per day from July 24, 1954, until the date of judgment.

The above stated compensation is to be paid by plaintiff without prejudice to any rights or claims which the defendants, Goodyear Farms, Bill W. Mullins or Adaman Mutual Water Company may have arising out of a certain petition for intervention which has been filed with the Clerk of the Court in the above-entitled cause on or about July 23, 1954.

It Is Further Stipulated and Agreed that the complaint in condemnation, declaration of taking and all pleadings and orders filed in this proceeding may be considered amended in accordance with this Stipulation and that a judgment will be entered in the above-entitled cause for the payment of the sum of \$14,100.00, plus interest, as above recited, for the just compensation in full to be paid by the plaintiff for the taking in condemnation of the unencumbered fee simple title to the lands above described containing 24.61 acres, more or less, together with all improvements thereunto belonging, including crop damage and damage to the remain-

ing land owned by the defendants, subject only to such easements as may be or have been waived by the plaintiff, and said judgment shall provide, among other things, for the deposit of additional funds into the Registry of the Court to satisfy the same.

The defendants, Goodyear Farms and Bill W. Mullins hereby enter their appearance in this action and expressly waive service of summons, petition and any and all other process and all right to a hearing on the petition and pleadings filed in this action, and the right to the appointment of commissioners or the selection of a jury for the determination of just compensation for said tract.

Executed on the 14th day of February, 1955.

[Seal]

GOODYEAR FARMS,
An Arizona Corporation,

By /s/ R. W. LITCHFIELD,
President.

Attest:

/s/ W. N. KRING,
Assistant Secretary.

/s/ BILL W. MULLINS,
Defendants.

UNITED STATES OF
AMERICA,
Plaintiff,

JACK D. H. HAYS,

United States Attorney for
the District of Arizona;

/s/ EVERETT L. GORDON,

Assistant United States
Attorney.

[Endorsed]: Filed May 13, 1955.

[Title of District Court and Cause.]

JUDGMENT IN RE TRACT NO. 118

This cause coming on regularly to be heard before the Court upon a stipulation entered into by and between the defendants, Goodyear Farms, a corporation, and Bill W. Mullins, and the plaintiff, United States of America, and

It appearing to the Court that the sum of \$8,370.00 has been deposited in the Registry of the Court as estimated just compensation for the taking of the following described real estate:

That portion of the Northeast quarter of the Northwest quarter ($NE\frac{1}{4}NW\frac{1}{4}$) of Section Eighteen (Sec. 18), Township Two North (T2N), Range One West (R1W), Gila and Salt River Meridian, County of Maricopa, State of Arizona, described as follows, basis of bearings being transverse Mercator Grid, Central Zone, Arizona:

Beginning at the North $\frac{1}{4}$ corner of said Section 18; thence along the North line of said Section West 471.92 feet, more or less, to a line which bears South $42^{\circ} 48' 58''$ West from a point in the East line of Section 7 of said Township and Range, said point being distant North $0^{\circ} 01' 46''$ East 753.11 feet from the East $\frac{1}{4}$ corner of said Section 7; thence Southwesterly along the said line bearing South $42^{\circ} 48' 58''$ West, a distance of 375.03 feet, more or less, to a point distant South $42^{\circ} 48' 58''$ West 4953.45 feet from said point in the East line of Section 7; thence South $47^{\circ} 11' 02''$ East 990.82 feet, more or less, to the East line of said Northwest $\frac{1}{4}$ of Section 18; thence along said East line North 948.51 feet, more or less, to the point of beginning.

Containing 9.40 acres, more or less, including 1.05 acres, more or less, in streets.

It further appearing to the Court that the plaintiff has amended its complaint condemning the following described property:

The East 812.06 feet of the Northeast Quarter of the Northwest Quarter ($NE\frac{1}{4}NW\frac{1}{4}$) of Section 18 (Sec. 18), Township Two North (T2N), Range One West (R1W), Gila and Salt River Meridian in the County of Maricopa, State of Arizona.

Containing 24.61 acres, more or less, including 1.59 acres, more or less, in streets,

reserving, however, an easement upon approximately .78 acre thereof (hereinafter described) to Adaman Mutual Water Company, an Arizona corporation, its successors and assigns, for an underground irrigation pipeline, in, on, over and across said .78 acre, together with the absolute right at all times of ingress and egress thereto, and the right to go upon said .78 acre with men and equipment in order to repair, replace, maintain and construct, and otherwise attend the said underground irrigation pipeline for which said easement is granted; a description of said .78 acre upon which said easement is granted is as follows:

A strip of land 20 feet in width lying 10 feet on each side of the following described center line, basis of bearings being transverse Mercator Grid, Central Zone, Arizona.

Beginning at a point distant Westerly 510.23 feet along the North line of said Section 18, from the North quarter section corner of said section; thence South $42^{\circ} 48' 58''$ West 361.05 feet, more or less, to a point; thence Southeasterly along a line bearing South $47^{\circ} 11' 02''$ East, a distance of 968.70 feet, more or less, to a point in a line parallel to on the West 45 feet distant from the N-S Mid-section line of said Section 18; thence southerly along said line bearing South $0^{\circ} 03' 12''$ East distance of 371.78 feet, more or less, to the South line of the Northeast quarter of the

Northwest quarter (NE $\frac{1}{4}$ NW $\frac{1}{4}$) of said Section 18, the point of ending.

Containing 0.78 acre, more or less.

It Is Ordered, Adjudged and Decreed that:

(1) The sum of \$14,100.00 plus interest at \$1.562 per day from July 24, 1954, until paid is the reasonable and just compensation to be paid in full for the unencumbered fee simple title to the 24.61 acres of land, more or less, including 1.59 acres, more or less, in streets, which is above described on Page 2 herein, together with all improvements thereunto belonging, subject to existing easements for public roads and highways, public utilities and pipelines;

(2) That the plaintiff is ordered and directed to pay into the Registry of this Court for the persons entitled thereto the sum of \$5,730.00, and in addition thereto sufficient funds for the payment of interest at \$1.562 per day from July 24, 1954, until paid.

(3) That simultaneously upon the payment by the plaintiff of the sums set out herein in Paragraph 2, all valid liens and claims of whatsoever nature against said lands shall be transferred from said lands to the funds so deposited in the Registry of this Court to the end that the United States of America will take an unencumbered fee simple title to the whole of said 24.61 acres, more particularly described on Page 2 herein, free and discharged of all liens and claims whatsoever.

(4) That the defendants, Goodyear Farms, a corporation and Bill W. Mullins, shall have judgment against the plaintiff as and for compensation for the taking of said Tract No. 118, as described on Page 2 herein, subject to the prior claims, rights, interest, equities and liens, if any, of such other persons as the Court shall hereafter find and determine to have any compensable interest in said tract, which rights and interests by this judgment are transferred to and imposed upon the funds to be deposited by the plaintiff in satisfaction of the award herein fixed and ordered to be paid.

(5) That the judgment against said plaintiff shall be in the amount set out in Paragraph 2; that the respective rights of the defendants, Goodyear Farms, a corporation, and Bill W. Mullins and others to participate in and their respective shares of said award are to be determined by the subsequent order of the Court.

(6) This Court retains jurisdiction for the purpose of entertaining such further orders and decrees as may be necessary in the premises including an adjudication of the rights of the respective claimants in and to the funds to be deposited in the Registry of this Court by the plaintiff in satisfaction of the award herein made.

Dated this 13th day of May, 1955.

/s/ DAVE W. LING,

Judge, United States District Court, for the District of Arizona.

[Endorsed]: Filed May 13, 1955.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between the United States of America, hereinafter called the plaintiff, Goodyear Farms, a corporation, hereinafter called Goodyear, and Ray M. Lorette and Cleo M. Lorette, his wife, hereinafter called the defendants, that:

Whereas, an action in condemnation was commenced in the above Court on November 27, 1953, by the filing of a Declaration of Taking and a Complaint in condemnation on behalf of the United States of America at the request of the Under Secretary of the Air Force; and

Whereas, the defendants are the lessees of a certain parcel of real estate, hereinafter described, title to which is held in fee by Goodyear by virtue of a certain deed made and executed by the Valley Ranch Company, a corporation, dated June 30, 1931, and recorded December 1, 1931, in Docket 262 of Deeds, page 15, in Records of Maricopa County, Arizona; and

Whereas, the Complaint aforementioned was filed to condemn the property so leased, and more particularly described in said condemnation proceeding as follows:

Tract No. 113

That portion of the South half of the Northeast quarter ($S\frac{1}{2}$ $NE\frac{1}{4}$) of Section Seven

(Sec. 7), Township Two North (T 2 N), Range One West (R 1 W), Gila and Salt River Meridian, in the County of Maricopa, State of Arizona, described as follows, basis of bearings being transverse Mercator Grid, Central Zone, Arizona:

Beginning at the East $\frac{1}{4}$ corner of said Section 7; thence along the East line of said Section North $0^{\circ} 01' 46''$ East 753.11 feet; thence South $42^{\circ} 48' 58''$ West 1019.98 feet, more or less, to the South line of said Northeast $\frac{1}{4}$ of Section 7; thence along said South line South $89^{\circ} 35' 37''$ East 692.86 feet, more or less, to the point of beginning.

Excepting all of that certain strip of land, approximately 45 feet wide, designated as a drainage ditch and more particularly described in a quitclaim deed from Goodyear Farms to Adaman Mutual Water Company, recorded August 4, 1953, in Docket 1180, page 528, in the office of the County Recorder of said County, lying within the boundaries of the above-described land.

Containing 5.27 acres, more or less, including 0.55 acre, more or less, in street.

and under the provisions of the Declaration of Taking Act (46 Stat. 1421), the title to the lands above described in fee simple, subject to existing easements for public roads and highways, public utilities, railroads and pipelines, vested in the United

States of America, and the right to just compensation for the same was likewise, under the provisions of said Act, vested in the persons entitled thereto, and

Whereas the sum of Five Thousand Fifty and no/100 (\$5,050.00) has been deposited by the plaintiff in the Registry of the Court as compensation for the taking of the above-described tract,

Now, therefore, it is hereby stipulated and agreed by and between the above-named parties that the sum of Five Thousand Fifty and no/100 (\$5,050.00) Dollars, plus interest as hereinafter set forth is just compensation in full to be paid by the plaintiff for the taking in condemnation of the unencumbered fee simple title to the lands above described, together with all improvements thereunto belonging, including crop damage to the remaining land owned by the defendants, subject only to such easements as may be, or have been, waived by plaintiff.

It is further stipulated and agreed that from the compensation to be paid, all liens and encumbrances including adverse claims by the lessee shall first be satisfied and that payment shall be made as follows:

(1) To Goodyear Farms, a corporation, the sum of Four Thousand Six Hundred Twenty and 84/100 (\$4,620.84) Dollars plus \$.5134 interest per day after July 24, 1954, until the date of judgment.

(2) To Adaman Mutual Water Company, a non-profit corporation, the sum of Four Hundred

Twenty-Nine and 16/100 (\$429.16) Dollars, plus \$.0466 interest per day after July 24, 1954, until the date of judgment.

The above compensation is to be paid by the plaintiff without prejudice to any rights or claims which the defendants, Goodyear Farms, a corporation, and Ray M. Lorette and Cleo M. Lorette, his wife, may have arising out of a certain petition for intervention filed with the Clerk of this Court in the above-entitled cause July 23, 1954.

The defendants, Goodyear Farms, a corporation, and Ray M. Lorette and Cleo M. Lorette, his wife, hereby enter their appearance in this action and expressly waive service of summons, petition and any and all other process and all right to a hearing on the petition and pleadings filed in this action and the right to the appointment of commissioners or the selection of a jury for the determination of just compensation for said tract.

The above-named parties agree to the entering of a judgment in conformity with this Stipulation, fixing the value of the land hereinbefore described as recited herein, and setting forth the conditions and provisions of this Stipulation.

Executed on the 14th day of February, 1955.

[Seal]

GOODYEAR FARMS,

An Arizona Corporation,

/s/ R. W. LITCHFIELD,

President.

Attest:

/s/ W. N. KRING,
Assistant Secretary.

/s/ RAY M. LORETTE,

/s/ CLEO M. LORETTE,
Defendants.

UNITED STATES OF
AMERICA,
Plaintiff,

JACK D. H. HAYS,
United States Attorney,
for the District of Arizona;

/s/ EVERETT L. GORDON,
Assistant United States
Attorney, Plaintiff.

[Endorsed]: Filed May 13, 1955.

[Title of District Court and Cause.]

JUDGMENT IN RE TRACT No. 113

This cause coming on regularly to be heard before the Court upon a stipulation entered into by and between the defendants, Goodyear Farms, a corporation, and Ray M. Lorette and Cleo M. Lorette, his wife, and the plaintiff, United States of America, and

It appearing to the Court that the sum of \$5,-050.00 has been deposited in the Registry of the Court as estimated just compensation for the taking of the following-described real estate:

That portion of the South half of the Northeast quarter ($S\frac{1}{2}$ $NE\frac{1}{4}$) of Section Seven (Sec. 7), Township Two North (T 2 N), Range One West (R 1 W), Gila and Salt River Meridian, in the County of Maricopa, State of Arizona, described as follows, basis of bearings being transverse Mercator Grid, Central Zone, Arizona:

Beginning at the East $\frac{1}{4}$ corner of said Section 7, thence along the East line of said Section North $0^{\circ} 01' 46''$ East 753.11 feet; thence South $42^{\circ} 48' 58''$ West 1019.98 feet, more or less, to the South line of said Northeast $\frac{1}{4}$ of Section 7; thence along said South line South $89^{\circ} 35' 37''$ East 692.86 feet, more or less, to the point of beginning.

Excepting all of that certain strip of land, approximately 45 feet wide, designated as a drainage ditch and more particularly described in a quitclaim deed from Goodyear Farms to Adaman Mutual Water Company, recorded August 4, 1953, in Docket 1180, page 528, in the Office of the County Recorder of said County, lying within the boundaries of the above-described land.

Containing 5.27 acres, more or less, including 0.55 acre, more or less, in street.

It is ordered, adjudged and decreed that:

(1) The sum of \$5,050.00 plus interest in the sum of \$0.56 per day from July 24, 1954, until paid is the reasonable and just compensation to be paid in full for the unencumbered fee simple title to the lands above described together with all improvements thereunto belonging, subject to existing easements for public roads and highways, public utilities and pipelines;

(2) That the plaintiff is ordered and directed to pay into the Registry of this Court for the persons entitled thereto, sufficient funds for the payment of interest on the aforesaid sum of \$5,050.00 at \$0.56 per day from July 24, 1954, until paid.

(3) That the Clerk of this Court be, and he is hereby directed to pay to Goodyear Farms the sum of \$4,620.84 and to pay to Adaman Mutual Water Company the sum of \$429.16, representing the funds upon deposit in the Registry of the Court, by means of making his checks in said sums payable to said corporations; and that delivery thereof be made by means of mailing the same to their attorneys, Snell & Wilmer, Security Building, Phoenix, Arizona.

(4) That simultaneously upon the payment by the plaintiff into the Registry of this Court of the said sums set out herein in Paragraph 2, all valid liens and claims of whatsoever nature against said lands shall be transferred from said lands to the

funds so deposited in the Registry of this Court to the end that the United States of America will take an unencumbered title to the whole of said tract of real property, free and discharged of all liens and claims whatsoever.

(5) That the defendant Goodyear Farms shall have judgment against the plaintiff as and for compensation for the taking of said Tract No. 113, subject to the prior claims, rights, interest, equities and liens, if any, of such other persons as the Court shall hereafter find and determine to have any compensable interest in said tract, which rights and interests by this judgment are transferred to and imposed upon the funds to be deposited by the plaintiff in satisfaction of the award herein fixed and ordered to be paid.

(6) That the judgment against said plaintiff shall be in the amount set out in Paragraph 2; that the respective rights of the defendants, Goodyear Farms and Adaman Mutual Water Company to participate in and their respective shares of said award are to be determined by the subsequent order of the Court.

(7) This Court retains jurisdiction for the purpose of entertaining such further orders and decrees as may be necessary in the premises including an adjudication of the rights of the respective claimants in and to the funds to be deposited in the Registry of this Court by the plaintiff in satisfaction of the award herein made.

Dated this 13th day of May, 1955.

/s/ DAVE W. LING,
Judge, United States District Court for the District
of Arizona.

[Endorsed]: Filed May 13, 1955.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between the United States of America, hereinafter called the plaintiff, and Adaman Mutual Water Company, an Arizona non-profit corporation, hereinafter called the defendant, that:

(1) Whereas, an action in condemnation was commenced in the above Court on November 27, 1953, by the filing of a Declaration of Taking and a Complaint in condemnation on behalf of the plaintiff at the request of the Under Secretary of the Air Force; and

(2) Whereas, one of the tracts of land therein identified as Tract No. 120 and more particularly described as follows:

A strip of land described approximately as the West 45 feet of the East 78 feet of Sections Seven and Eighteen (Secs. 7 and 18) in Township Two North (T 2 N), Range One West (R 1 W), Gila and Salt River Meridian,

in the County of Maricopa, State of Arizona, said strip of land being a portion of that certain parcel of land designated as a drainage ditch and more particularly described in a quitclaim deed from Goodyear Farms to Adaman Mutual Water Company, recorded August 4, 1953, in Docket 1180, page 528 in the Office of the County Recorder of said County.

Except that portion of said certain parcel of land lying Southerly and Westerly of the South line of the North $\frac{1}{2}$ of the Northeast $\frac{1}{4}$ of said Section 18.

Also except that portion of said certain parcel of land lying Northerly and Westerly of a line bearing South $42^{\circ} 48' 58''$ West from a point in the East line of said Section 7, said point being distant North $0^{\circ} 01' 46''$ East 753.11 feet from the East $\frac{1}{4}$ corner of said Section 7.

Containing 4.81 acres, more or less.

is represented to be owned by the defendant, and

(3) Whereas, only a portion of the property described in Paragraph 2 above was in fact owned by the defendant, to wit:

A strip of land described approximately as the West 45 feet of the East 78 feet of Section 7 in Township 2 North, Range 1 West, Gila and Salt River Meridian, in the County of Maricopa, State of Arizona, said strip of land being a portion of that certain parcel of land

designated as a drainage ditch, and more particularly described in a quitclaim deed from Goodyear Farms to Adaman Mutual Water Company, recorded August 4, 1953, in Docket 1180, page 528 in the Office of the County Recorder of said County.

Except that portion of said certain parcel lying Southerly and Westerly of the South line of said Section 7 and also except that portion lying Northerly and Westerly of a line bearing South $42^{\circ} 48' 58''$ West from a point in the East line of said Section 7, said point being distant North $0^{\circ} 01' 46''$ East 753.11 feet from the East one-quarter corner of said Section 7.

Containing 3.45 acres, more or less
and

(4) Whereas, under the provisions of the Declaration of Taking Act (46 Stat. 1421), the title to the lands above described in fee simple, subject to existing easements for public roads and highways, public utilities, railroads and pipe lines, vested in the United States of America, and the right to just compensation for the same was likewise, under the provisions of said Act, vested in the persons entitled thereto.

Now, therefore, it is hereby stipulated and agreed by and between the above-named parties that the sum of Two Thousand Sixty-Two and 50/100 (\$2,-062.50) Dollars, inclusive of interest, is the just compensation in full to be paid by the plaintiff for

the taking and condemnation of the unencumbered fee simple title to the lands hereinbefore described in Paragraph 3, together with all improvements thereunto belonging, including crop damage and damage to the remaining land owned by the defendant, subject only to such easements as have been waived by the plaintiff.

The above-stated compensation is to be made by the plaintiff without prejudice to any rights or claims which Adaman Mutual Water Company, an Arizona non-profit corporation, may have arising out of a certain Petition for Intervention which has been filed with the Clerk of the Court in the above-entitled cause on or about July 24, 1954.

The defendant hereby enters its appearance in this action and expressly waives service of summons, petition and any and all other process and all right to a hearing on the petition and pleadings filed in this action and the right to the appointment of commissioners or jury for the determination of just compensation for said tract.

The party hereto agrees to the entering of a judgment in conformity with this Stipulation, fixing the value of the land hereinbefore described in Paragraph 3, and setting forth the conditions and provisions of this Stipulation; that the Complaint in condemnation, Declaration of Taking and all pleadings and orders filed in this proceeding may be considered amended in accordance with this Stipulation.

Executed on the 27th day of December, 1954.

ADAMAN MUTUAL WATER
COMPANY,

An Arizona Non-Profit
Corporation, Defendant,

By /s/ K. B. McMICKEN,
President.

Attest:

/s/ W. N. KRING,
Secretary.

UNITED STATES OF
AMERICA,
Plaintiff.

JACK D. H. HAYS,
United States Attorney,
for the District of Arizona;

/s/ EVERETT L. GORDON,
Asst. United States Attorney.

[Endorsed]: Filed May 13, 1955.

[Title of District Court and Cause.]

JUDGMENT IN RE TRACT No. 120

This cause coming on regularly to be heard before the Court upon stipulation between the defendant, Adaman Mutual Water Company, an Arizona corporation, and the plaintiff, United States of America, and

It appearing to the Court that the sum of \$2,-400.00 has been deposited in the Registry of the Court as the estimated just compensation for the property identified in these proceedings as Tract No. 120, comprising approximately 4.81 acres, and whereas the defendant Adaman Mutual Water Company in fact owned only 3.45 acres which is described as follows:

A strip of land described approximately as the West 45 feet of the East 78 feet of Section 7 in Township 2 North, Range 1 West, Gila and Salt River Meridian, in the County of Maricopa, State of Arizona, said strip of land being a portion of that certain parcel of land designated as a drainage ditch, and more particularly described in a quitclaim deed from Goodyear Farms to Adaman Mutual Water Company, recorded August 4, 1953, in Docket 1180, page 528 in the Office of the County Recorder of said County.

Except that portion of said certain parcel lying Southerly and Westerly of the South line of said Section 7 and also except that portion lying Northerly and Westerly of a line bearing South $42^{\circ} 48' 58''$ West from a point in the East line of said Section 7, said point being distant North $0^{\circ} 01' 46''$ East 753.11 feet from the East one-quarter corner of said Section 7.

Containing 3.45 acres, more or less, and

It appearing to the Court that the defendant Adaman Mutual Water Company has stipulated with the plaintiff that the sum of \$2,062.50, inclusive of interest, is the reasonable and just compensation to be paid for the unencumbered fee simple title to said 3.45 acres, subject to existing easements for public roads and highways, public utilities, railroads and pipelines, and

It appearing upon the motion of plaintiff that the sum of \$337.50 (surplus deposit) should be returned to the Treasurer of the United States of America,

It Is Ordered, Adjudged and Decreed:

1. That the reasonable and just compensation for the taking of the unencumbered fee simple title subject to existing easements for public roads and highways, public utilities, railroads and pipelines to the lands hereinabove described is the sum of \$2,062.50, inclusive of interest;

2. That the title in fee simple to the lands described above is now vested in the United States of America and is now hereby confirmed and held to be in the United States of America;

3. That the Clerk of this Court pay to the defendant, Adaman Mutual Water Company, the sum of \$2,062.50 from the Registry of the Court by means of making his check in that sum payable to the said defendant and deliver same by means of

mailing to defendant's attorneys, Snell & Wilmer, Security Building, Phoenix, Arizona.

4. That the Clerk of this Court make his check in the sum of \$337.50 payable to the Treasurer of the United States and that he deliver the same to the United States Attorney for the District of Arizona for transmittal to the proper agency of the United States.

Enter: May 13, 1955.

/s/ DAVE W. LING,

Judge, United States District Court for the District of Arizona.

[Endorsed]: Filed May 13, 1955.

[Title of District Court and Cause.]

STIPULATION CONCERNING TRACT No. 116

It is hereby stipulated and agreed by and between United States of America, hereinafter called the plaintiff, and Goodyear Farms, a corporation, and Adaman Mutual Water Company, a corporation, hereinafter called the defendants, that:

Whereas, an action in condemnation was commenced in the above-entitled proceeding on November 27, 1953, by the filing of a Declaration of Taking and a Complaint in condemnation on behalf of the United States of America at the request of the Under Secretary of the Air Force, and

Whereas, a certain parcel, identified in said Declaration of Taking as Tract No. 116 was described as follows:

The North half of the Northeast quarter ($N\frac{1}{2}$ $NE\frac{1}{4}$) of Section Eighteen (Sec. 18), Township Two North (T 2 N), Range One West (R 1 W), Gila and Salt River Meridian, in the County of Maricopa, State of Arizona.

Excepting all of that certain strip of land, approximately 45 feet wide, designated as a drainage ditch and more particularly described in a quitclaim deed from Goodyear Farms to Adaman Mutual Water Company, recorded August 4, 1953, in Docket 1180, page 528, in the office of the County Recorder of said County, lying within the boundaries of the above-described land.

Also excepting that certain parcel of land known as Well Site 18-C and described in said quitclaim deed as follows:

Commencing at the North $\frac{1}{4}$ corner of said Section 18; thence East (assumed bearing) a distance of 33.0 feet to a point; thence South and parallel to the mid-section line of said Section, a distance of 33.0 feet to the true point of beginning; thence continuing South on the same line a distance of 35.0 feet; thence East and parallel to the North line of said Section, a distance of 67.0 feet; thence North and parallel to said mid-section line, a distance of 35.0

feet; thence West and parallel to the North line of said Section, a distance of 67.0 feet to the true point of beginning.

Containing 78.59 acres, more or less, including 3.95 acres, more or less, in streets

and

Whereas, said Declaration of Taking represented that Joseph F. Bulfer, Jr., and Mary Bulfer, husband and wife, were the owners in fee simple of said property, and

Whereas, in fact, said Joseph F. Bulfer, Jr., and Mary Bulfer were the owners in fee simple of the following described parcel of real estate:

Tract No. 116

The North half of the Northeast Quarter ($N\frac{1}{2}$ $NE\frac{1}{4}$) of Section Eighteen (Sec. 18), Township Two North (T 2 N), Range One West (R 1 W), Gila and Salt River Meridian, County of Maricopa, State of Arizona.

Containing 80.00 acres, more or less, including 3.95 acres, more or less, in streets, and 1.38 acres, more or less, in easements for irrigation purposes

and

Whereas, the additional acreage of approximately 1.38 acres, more or less, contained in the description immediately preceding was acquired by the United States of America through the filing of the Declaration of Taking by including said 1.38 acres

within the description of Tract No. 120 in said proceedings, and

Whereas, Joseph F. Bulfer, Jr., and Mary Bulfer, husband and wife, have entered into a Stipulation concerning said Tract No. 116, which recites, among other things, that Goodyear Farms, a corporation, has been paid the sum of \$35,027.56, and Adaman Mutual Water Company, a corporation, has been paid the sum of \$6,281.13, which said sums represent payments in full to said corporations for any and all claims, rights, titles or interests which said corporations have in and to the following described premises:

Tract No. 116

The North half of the Northeast quarter ($N\frac{1}{2}$ $NE\frac{1}{4}$) of Section Eighteen (Sec. 18), Township Two North (T 2 N), Range One West (R 1 W), Gila and Salt River Meridian, County of Maricopa, State of Arizona.

Containing 80.00 acres, more or less, including 3.95 acres, more or less, in streets, and 1.38 acres, more or less, in easements for irrigation purposes

and

Whereas, the sum of \$52,370.00 has been deposited in the Registry of this Court for the property immediately described above comprising 80.00 acres, more or less, including 3.95 acres, more or less, in streets, and 1.38 acres, more or less, in easements for irrigation purposes.

Now, therefore, it is hereby stipulated and agreed by and between the above-named parties that Good-year Farms, a corporation, and Adaman Mutual Water Company, a corporation, hereby disclaim any interest in and to the funds remaining on deposit in the Registry of the Court for the compensation in full to be paid by the plaintiff for the taking in condemnation of the unencumbered fee simple title to the lands hereinafter described, together with all improvements thereunto belonging, including crop damage, subject only to such easements as have been waived by plaintiff, to wit:

The North half of the Northeast quarter (N $\frac{1}{2}$ NE $\frac{1}{4}$) of Section Eighteen (Sec. 18), Township Two North (T 2 N), Range One West (R 1 W), Gila and Salt River Meridian, County of Maricopa, State of Arizona.

Containing 80.00 acres, more or less, including 3.95 acres, more or less, in streets, and 1.38 acres, more or less, in easements for irrigation purposes

without prejudice, however, to any rights which said Goodyear Farms, a corporation, and Adaman Mutual Water Company, a corporation, may have by virtue of a certain Petition for Intervention filed in this proceeding on the 24th day of July, 1954.

[Seal]

GOODYEAR FARMS,

An Arizona Corporation,

By /s/ R. W. LITCHFIELD,

President.

Attest:

/s/ ARDEN E. FIRESTONE,
Secretary.

ADAMAN MUTUAL WATER
COMPANY,
An Arizona Non-Profit
Corporation,

By /s/ K. B. McMICKEN,
President,
Defendants.

Attest:

By /s/ W. N. KRING,
Secretary.

UNITED STATES OF
AMERICA,
Plaintiff.

JACK D. H. HAYS,
United States Attorney,
for the District of Arizona;

/s/ EVERETT L. GORDON,
Assistant United States
Attorney.

[Endorsed]: Filed July 21, 1955.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between the United States of America, hereinafter called the plaintiff, and Joseph F. Bulfer, Jr., and Mary Bulfer, husband and wife, hereinafter called the defendants, that:

Whereas, action in condemnation was commenced in the above court on November 27, 1953, by the filing of a declaration of taking and a complaint in condemnation on behalf of the United States of America at the request of the Under Secretary of the Air Force; and

Whereas, the defendants, Joseph F. Bulfer, Jr., and Mary Bulfer, husband and wife, were the owners in fee simple title to the following described parcel of real estate:

Tract No. 116

The North Half of the Northeast Quarter ($N\frac{1}{2}$ $NE\frac{1}{4}$) of Section Eighteen (Sec. 18), Township Two North (T 2 N), Range One West (R 1 W), Gila and Salt River Meridian, County of Maricopa, State of Arizona.

Containing 80.00 acres, more or less, including 3.95 acres, more or less, in streets, and 1.38 acres, more or less, in easements for irrigation purposes

and under the provisions of the Declaration of Taking Act (46 Stat. 1421), the title to the lands above described in fee simple, subject to existing easements for public roads and highways, public utilities, railroads and pipelines, vested in the United States of America, and the right to just compensation for the same was likewise, under the provisions of said Act, vested in the persons entitled thereto; and

Whereas, Joseph F. Bulfer, Jr., and Mary Bulfer, husband and wife, were the owners in fee simple of the above-described land as aforesaid.

Now, therefore, it is hereby stipulated and agreed by, and between, the above-named parties that the sum of Fifty-Two Thousand Three Hundred Seventy and No/100 (\$52,370.00) Dollars, inclusive of interest, is the just compensation in full to be paid by the plaintiff for the taking and condemnation of the unencumbered fee simple title to the lands hereinbefore described, together with all improvements thereunto belonging, including crop damage, subject only to such easements as may be, or have been, waived by plaintiff. That the aforesaid sum shall be paid as follows:

(1) Pay to Goodyear Farms, a corporation, the sum of Thirty-Five Thousand and Twenty-Seven and 56/100 (\$35,027.56) Dollars, as full satisfaction and discharge of the mortgage lien on said parcel of real estate.

(2) Pay to Adaman Mutual Water Company, a corporation, the sum of Six Thousand Two Hun-

dred Eighty-One and $13/100$ (\$6,281.13) Dollars, the remainder of assessment against the hereinbefore described property.

(3) Pay to Joseph F. Bulfer, Jr., and Mary Bulfer, husband and wife, the remaining Eleven Thousand and Sixty-One and $31/100$ (\$11,061.31) Dollars, which includes the sum of One Thousand Three Hundred Seventy and No/100 (\$1,370.00) Dollars, as damage to remaining crops, and Nine Thousand Six Hundred Ninety-One and $31/100$ (\$9,691.31) Dollars, as balance of just compensation to be paid for fee simple taking of said land. It is agreed that from said sum there shall first be paid any and all liens, balance due on taxes and remaining encumbrances against said land, including adverse claims or claims by lessees.

The defendants, Joseph F. Bulfer, Jr., and Mary Bulfer, husband and wife, hereby enter their appearance in this action and expressly waive service of summons, petition and any and all other process and all right to a hearing on the petition and pleadings filed in this action and the right to the appointment of Commissioners or Jury for the determination of just compensation for said tract.

The above-named parties hereby agree to the entering of a judgment in conformity with this stipulation, fixing the value of the land hereinbefore described as recited herein, and setting forth the conditions and provisions of this stipulation.

Executed on the 21st day of July, 1954.

/s/ JOSEPH F. BULFER, JR.,

/s/ MARY BULFER,

Defendants.

UNITED STATES OF
AMERICA,

JACK D. H. HAYS,

United States Attorney;

/s/ EVERETT L. GORDON,

Assistant United States
Attorney.

[Endorsed]: Filed July 21, 1955.

[Title of District Court and Cause.]

JUDGMENT IN RE TRACT 116

This cause coming on regularly to be heard before the Court upon the Stipulation between the defendants, Joseph F. Bulfer, Jr., and Mary Bulfer, husband and wife, and the plaintiff, United States of America, and

It appearing to the Court that the sum of \$52,-370.00 has been deposited in the Registry of this Court as estimated just compensation for the following described real estate (including crop damage);

Tract No. 116

The North Half of the Northeast Quarter
(N $\frac{1}{2}$ NE $\frac{1}{4}$) of Section Eighteen (Sec. 18),

Township Two North (T 2 N), Range One West (R 1 W), Gila and Salt River Meridian, County of Maricopa, State of Arizona.

Containing 80.00 acres, more or less, including 3.95 acres, more or less, in streets, and 1.38 acres, more or less, in easements for irrigation purposes.

It is ordered, adjudged and decreed that the reasonable just compensation for the taking of the unencumbered fee simple title, subject to existing easements for public roads and highways, public utilities, railroads and pipelines, to the lands hereinabove described, inclusive of interest and crop damage, is the sum of \$52,370.00, and that title in fee simple to said lands is now vested in the United States of America, and is hereby confirmed and held to be in the United States of America.

It is further ordered, adjudged and decreed that said sum having been paid to the defendants pursuant to orders heretofore entered herein, that the award and judgment hereby rendered in favor of said defendants be, and the same is fully discharged, paid and satisfied.

Done in open court this 26th day of July, 1955.

/s/ JAMES A. WALSH,

Judge, United States District Court for the District of Arizona.

[Endorsed]: Filed July 26, 1955.

[Title of District Court and Cause.]

MINUTE ENTRY OF THURSDAY.

DECEMBER 29, 1955

Honorable Dave W. Ling, United States District Judge, presiding.

It is ordered that the Motion for Intervention of Adaman Mutual Water Company, an Arizona non-profit corporation on behalf of itself and its stockholders; Goodyear Farms, an Arizona corporation; Harry A. Kandarian and Bernita Kandarian, husband and wife; Peter Nalbandian, as his sole and separate property; Joseph E. Bulfer and Mary Bulfer, husband and wife; Calvin F. Jones and Margaret Jones, husband and wife; Jonathan Thomas Rogers, a single man; Jefferson Z. Rogers, a married man; John Newton Edge and Margaret Elizabeth Edge, husband and wife; Harold Ralph Hunt and Georgia May Hunt, husband and wife; George Reismann and Joanna Reismann, husband and wife; Lee Weldon Merritt and Peggy Childers Merritt, husband and wife; Raymond F. Austerman and Zula Austerman, husband and wife; John A. Sellers and Maxine Sellers, husband and wife; Marshall E. Manley and Mary Elizabeth Manley, husband and wife; Myron M. Mitchell and Irene Mitchell, husband and wife; Henry Hallam Hestand and Martha Sue Hestand, husband and wife; Chester Elwood Hunt and Mary Virginia Hunt; husband and wife; Olliver Kissling and Peggy Jean Kissling, husband and wife; Albert C. Lueck and Melva

Lueck, husband and wife; Ralph Ashby and Grace Ashby, husband and wife; Leon Fort and Doris C. Fort, husband and wife; Carlon A. Hinton and Verna Hinton, husband and wife; Roy Sheppard and Dora L. Sheppard, husband and wife; Herman Eaton and Dorothy Eaton, husband and wife; J. Elmer Woodward and Bernice Woodward, husband and wife; Juan Brashears and Betty Brashears, husband and wife; J. L. Bunger and Kathryn Bunger, husband and wife; Leon G. Gailey, Archer W. Seaver, Ray M. Lorette, George W. Busey, B. W. Mullins, James H. Sharp and Jewell J. Stone, is denied.

(Docketed Dec. 29, 1955.)

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Goodyear Farms, an Arizona corporation; Adaman Mutual Water Company, an Arizona non-profit corporation on behalf of itself and its stockholders; B. W. Mullins; James H. Sharp; George W. Busey; Carlon H. Hinton and Verna Hinton, his wife; Harold Ralph Hunt and Georgia May Hunt, his wife; George Reismann and Joanna Reismann, his wife; Raymond F. Austerman and Zula Austerman, his wife; Leon Fort and Doris C. Fort, his wife; John Newton Edge and Mary Elizabeth Edge, his wife, Petitioners for Intervention in the above-entitled cause, hereby appeal to the United States Court of

Appeals for the 9th Circuit from that certain order made and entered by the above-entitled Court in the above-entitled cause on December 29, 1955, denying the Motion for Intervention of said Petitioners for Intervention.

Dated this 26th day of January, 1956.

SNELL & WILMER,

By /s/ MARK WILMER,

Attorneys for Petitioners for Intervention Above
Named.

[Endorsed]: Filed January 26, 1956.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

We, the undersigned, Goodyear Farms, an Arizona corporation, Adaman Mutual Water Company, an Arizona non-profit corporation on behalf of itself and its stockholders, B. W. Mullins, James H. Sharp, George W. Busey, Carlon H. Hinton and Verna Hinton, his wife; Harold Ralph Hunt and Georgia May Hunt, his wife; George Reisemann and Joanna Reisemann, his wife; Raymond F. Austerman and Zula Austerman, his wife; Leon Fort and Doris C. Fort, his wife; John Newton Edge and Mary Elizabeth Edge, his wife, as principals, and Fidelity and Deposit Company of Maryland, a corporate surety, as surety, jointly and severally acknowledge that we and our heirs, personal repre-

sentatives, successors and assigns are bound to pay to the United States of America, plaintiff in the above-entitled cause the sum of Two Hundred Fifty Dollars (\$250).

The condition of this bond is that whereas the above-named Petitioners for Intervention, Good-year Farms, an Arizona corporation, Adaman Mutual Water Company, an Arizona non-profit corporation on behalf of itself and its stockholders, B. W. Mullins, James H. Sharp, George W. Busey, Carlon H. Hinton and Verna Hinton, his wife; Harold Ralph Hunt and Georgia May Hunt, his wife; George Reisemann and Joanna Reisemann, his wife; Raymond F. Austerman and Zula Austerman, his wife; Leon Fort and Doris C. Fort, his wife; John Newton Edge and Mary Elizabeth Edge, his wife; have appealed to the Court of Appeals for the 9th Circuit by Notice of Appeal filed January, 1956, from the order entered by this Court on December 29, 1955, denying the Motion for Intervention of said Petitioners for Intervention, if said Petitioners for Intervention shall pay all costs adjudged against them if the appeal is dismissed or the action of this Court in denying said Motion is upheld, then this bond is to be void, but if the above-named Petitioners for Intervention fail to perform this condition, payment of the amount of this bond shall be due forthwith.

Dated January 26, 1956.

GOODYEAR FARMS, an Arizona Corporation;
ADAMAN MUTUAL WATER COMPANY,
an Arizona Non-Profit Corporation on Behalf

of its Stockholders and Itself; B. W. MUL-
LINS; JAMES H. SHARP; GEORGE W.
BUSEY; CARLON H. HINTON and VERA
HINTON, His Wife; HAROLD RALPH
HUNT and GEORGIA MAY HUNT, His
Wife; GEORGE REISEMANN and JOANNA
REISEMAN, His Wife; LEON FORT and
DORIS C. FORT, His Wife; RAYMOND F.
AUSTERMAN and ZULA AUSTERMAN,
His Wife; JOHN NEWTON EDGE and
MARY ELIZABETH EDGE, His Wife,

By /s/ MARK WILMER,
Their Attorney.

[Seal] FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,

By /s/ C. A. DRUMMOND,
Attorney in Fact.

[Endorsed]: Filed January 26, 1956.

[Title of District Court and Cause.]

PETITION FOR LEAVE TO FILE
AMENDED APPEARANCE

Come now Goodyear Farms, an Arizona corpora-
tion, Adaman Mutual Water Company, a non-profit
Arizona corporation, Bill W. Mullens and Ralph
Ashby and Grace Ashby, husband and wife, by their
attorneys, Snell & Wilmer and respectfully repre-
sent to the Court:

That they are defendants in the above-entitled action.

That under and by virtue of a Declaration of Taking and order for delivery of possession entered herein November 23, 1953, certain fee and leasehold interests of said defendants were taken by the United States as described in said Declaration of Taking. Defendants retain and are now in possession of certain other lands and leaseholds not taken by plaintiff, United States of America.

That compensation in part has been made to said defendants for lands taken, as provided in Judgments of this Court made and entered herein on the 13th day of May, 1955, in which Judgments the Court retained jurisdiction to enter further appropriate orders with relation to the issues involved herein.

These defendants with other petitioners heretofore filed herein a petition seeking to intervene in this action for the purpose of submitting to this Court their respective claims for damages as set forth in said petition for intervention. Said petition for intervention was by this Court denied on the 29th day of December, 1955.

The claims of these defendants consist of damages for avigation easements across lands of defendants not included in the Declaration of Taking herein, which easements are now in use but have not been condemned by plaintiff, United States of America; damages occasioned by the reduction in

the acreage available for assessment purposes of defendant Adaman Mutual Water Company and damages resulting from higher farming costs occasioned defendants by reason of constant flights of jet planes at low levels over or adjacent to their remaining lands and leaseholds.

These claims of defendants are for just compensation for property taken by plaintiff and defendants seek permission of this Court to present evidence as to the amount of compensation to be paid them for their property so taken and to share in the distribution of the deposit in court made by plaintiff.

Wherefore, defendants pray that they be permitted to file an amended notice of appearance, a copy of which notice is attached hereto, and that at the time of the final hearing of the issue of just compensation to be awarded these defendants they be permitted to present evidence as to the amount of compensation to be awarded them for all property and rights taken from them by plaintiff and that they be awarded just compensation for property so taken.

SNELL & WILMER,

By /s/ MARK WILMER,

Attorneys for Defendants.

[Title of District Court and Cause.]

AMENDED NOTICE OF APPEARANCE

Come Now Defendants Goodyear Farms, an Arizona corporation, Adaman Mutual Water Company, a non-profit Arizona corporation, Bill W. Mullins and Ralph Ashby and Grace Ashby, husband and wife, and submit their Amended Notice of Appearance herein as follows:

I.

That they have individually filed herein either a Notice of Appearance or have appeared through stipulations filed in this proceeding.

II.

That they have no objection or defense to the taking of their respective properties as described in the Declaration of Taking and the Order for Delivery of Possession entered herein and therefore as to such described properties they have filed no answer setting forth objections or defenses to such takings.

III.

Defendants Ralph Ashby and Grace Ashby, husband and wife, allege that subsequent to the filing of the complaint herein they have purchased all of the right, title and interest of defendants John M. Edge and Margaret Edge, husband and wife. All defendants herein allege that by reason of the taking of the 238.77 Acres of Land described in said Declaration of Taking and Order for Delivery of Possession, and by reason of the use thereafter

made of such lands by plaintiff, other properties and rights of defendants not described or included in such Declaration and Order have been taken. Defendants further allege that plaintiff, United States of America, has not compensated defendants for such properties and rights nor is compensation therefor contemplated in the proceeding.

IV.

By virtue of the above-described Order for Delivery of Possession, plaintiff, United States of America, took possession of approximately two hundred thirty-three (233) Acres of Land located within the Adaman Reclamation Project (hereinafter called "Project"), which Project contained before such taking two thousand eight hundred thirty-one (2831) Acres more or less. The remaining two thousand five hundred ninety-eight (2598) Acres in the Project are comprised of thirty-nine (39) tracts of land all but one of which has been and now are used for residential or agricultural purposes or both. These tracts of lands and the names of the owners, lessees or contract purchasers thereof are more particularly shown on a map attached hereto marked "Exhibit 1" and by reference made a part hereof.

V.

Said Project has been and is now being served water by the Defendant Adaman Mutual Water Company, an Arizona non-profit corporation (hereinafter called "Company"), which Company is owned by the owners of the lands in the Project

and which Company, for the purpose of furnishing water to the lands in the Project has drilled wells, constructed ditches, pipelines and installed and maintained pumps, machinery and other facilities for those purposes having invested therefor a capital sum in excess of Three Hundred Seventy Thousand and no/100 Dollars (\$370,000.00).

VI.

The owners, contract purchasers and lessees of lands within said Project are:

a. Adaman Mutual Water Company, an Arizona non-profit corporation, on behalf of itself as a water company and owner of fee lands within the Project, and on behalf of its stockholders as their interest may appear;

b. All other fee owners of lands within the Project being:

Goodyear Farms, an Arizona corporation;

Harry A. Kandarian and Bernita Kandarian, husband and wife;

Peter Nalbandian, as his sole and separate property;

Joseph E. Bulfer and Mary Bulfer, husband and wife;

Calvin F. Jones and Margaret Jones, husband and wife;

Jonathan Thomas Rogers, a single person;

Jefferson Z. Rogers, a married man;

John Newton Edge and Margaret Elizabeth Edge, husband and wife;

Harold Ralph Hunt and Georgia May Hunt, husband and wife;

George Reisemann and Joanna Reisemann, husband and wife;

Lee Weldon Merritt and Peggy Childers Merritt, husband and wife;

Raymond F. Austerman and Zula Austerman, husband and wife;

c. All owners of equitable interests (under Contracts of Purchase) in lands within the Project being:

John A. Sellers and Maxine Sellers, husband and wife;

Marshall E. Manley and Mary Elizabeth Manley, husband and wife;

Myron M. Mitchell and Irene Mitchell, husband and wife;

Henry Hallam Hestand and Martha Sue Hestand, husband and wife;

Chester Elwood Hunt and Mary Virginia Hunt, husband and wife;

Olliver Kissling and Peggy Jean Kissling, husband and wife;

Albert C. Lueck and Melva Lueck, husband and wife;

Ralph Ashby and Grace Ashby, husband and wife;

Leon Fort and Doris C. Fort, husband and wife;

Carlos A. Hinton and Verna Hinton, husband and wife;

Roy Sheppard and Dora L. Sheppard, husband and wife;

Herman Eaton and Dorothy Eaton, husband and wife;

J. Elmer Woodward and Bernice Woodward, husband and wife;

Juan Brashears and Betty Brashears, husband and wife;

J. L. Bunger and Kathryn Bunger, husband and wife;

Calvin F. Jones and Margaret P. Jones, husband and wife;

d. All lessees of lands within the Project being:

Leon G. Gailey

Archer W. Weaver

Ray M. Lorette

George W. Busey

B. H. Mullins

R. F. Austerman

James H. Sharp

Jewell J. Stone

VII.

As heretofore alleged, Adaman Mutual Water Company is a non-profit corporation organized under the laws of the State of Arizona. Its purpose is to provide irrigation water and irrigation facilities for the lands within the Project together with some domestic water. All of the issued and outstanding stock of the Company is owned by Project Landowners in proportion to the acreage each owns. The stock ownership and rights and obligations of the

stockholders are perpetually and inseparably bound and tied to the Project lands they own. These lands may not be transferred without the stock incident thereto, nor may the stock be transferred without the land. The initial cost of the Company and the cost and expense for the maintenance and operation of the Company are liens upon the stock and upon the land in amounts proportionate to the acreage each tract bears to the total acreage of the Project. The obligation to pay the charges and assessments therefor are like the liens they create, inseparably appurtenant to the Lands concerned, may not be transferred or separated therefrom, and are subject to enforcement by foreclosure.

VIII.

The afore-described Order for Delivery of Possession for approximately two hundred thirty-three (233) Acres of lands within the Project represents a taking of approximately 8.3 per cent of the former total Project acreage. However, the cost of maintenance of the Adaman Mutual Water Company is neither decreased by 8.3 per cent or at all, for the reason that no decrease was possible or was made in the number of wells, or in the number, length or size of ditches, pipelines, pumps or other facilities of the Company in order to serve what remains of the Project. Neither were any other substitute lands available for inclusion within the Project. Therefore 91.7 per cent of the lands in the Project (being all that now remains after condemnation) will forever and a day bear, in addition to

their fair proportion of the cost of the maintenance and operation of the Company, the burden of an added 8.3 per cent of this cost formerly borne by lands removed therefrom by the said Declaration of Taking.

IX.

Adaman Mutual Water Company further alleges that the approximately two hundred thirty-three (233) acres of land within the Project taken by the United States of America, by virtue of the Order for Delivery of Possession, was, as heretofore set forth, impressed with the perpetual and non-separable obligation to pay and maintain its prorata share of the cost of the construction, operation and maintenance of the Company's facilities; and said obligation constituted covenants running with and liens upon that land. Therefor, the United States of America, in taking said land but refusing to recognize or assume the obligation of the cost of the prorata share of the operation and maintenance expense (and assuming only the obligation of the prorata share of initial construction cost) has taken substantial and valuable rights from the Company and the stockholders thereof. These are the rights to assess and collect from the owners of such lands the prorata share of such costs of the maintenance and operation of the Company and such taking constitutes at law a taking for which compensation must be granted.

X.

Adaman Mutual Water Company further alleges 8.3 per cent of the average annual operation and

maintenance cost of the facilities of the Company (exclusive of charges for water used) is approximately Sixteen Hundred and No/100 Dollars (\$1600.00) per year. Defendants further allege the amount necessary to be invested at six per cent (6%) per annum to provide said sum is Twenty-seven Thousand and no/100 Dollars (\$27,000.00). In addition, Defendants allege the life of these facilities is not to exceed fifteen (15) years. The present day value of the annual payment which would otherwise have been made by the owners of the lands taken, had they remained within the Project, to amortize the investment in the Project during the ensuing fifteen (15) years so that the facilities would be replaced as needed, is approximately Thirty Thousand and no/100 Dollars (\$30,000.00).

XI.

As the direct and natural result of the extension of the jet aircraft runways (being the principal use to which condemned Project lands were put), the domestic and agricultural uses of certain of the remaining Project lands, and the value of the improvements thereon, are seriously curtailed and diminished, and, in some cases, totally destroyed. This curtailment, value diminution or destruction, amounting in fact to a taking, affects in varying degrees all of the Defendants who are owners, contract purchasers or lessees of Tracts 16, 17, 19, 20, 21 and 22 as shown on the map marked "Exhibit 1" attached hereto.

XII.

Defendants allege that during an average day approximately four hundred (400) jet planes from Luke Air Force Base will take off from one of two runways, said take-off direction being from north-east toward the southwest (being against the direction of the prevailing winds). Said take-offs will vary from single planes to groups of two or more planes. The frequency of said take-offs will vary from hour to hour during an average day from a low of a few planes per hour in the evening to highs of eighty (80) or more per hour during certain of the morning, noon and early afternoon hours and that the times of such take-offs will vary from day to day. The two runways afore-described are more clearly shown as the heavy solid blue lines on the map entitled "Exhibit 1."

XIII.

Defendants allege that the height of said planes taking off from the northern runway as they cross the lands of defendants nearest the runways is ten (10) feet above the ground and the height said planes cross lands of defendants farthest from the runways is only one hundred twenty (120) feet above the ground; that the height of the planes taking off from the southernmost runway as they cross lands of defendants nearest the runway is fifty (50) feet above the ground and as they cross the farthest lands, one hundred eighty (180) feet above the ground; all as more clearly shown on "Exhibit 1."

XIV.

Defendants allege that danger from such planes, the flames shooting behind them, the tow targets and machinery and oil they drop, the deafening noise they create and the constant fear of crashes into people working the fields, into farm machinery or into barns, homes, water towers, etc., causes the following damages (to a greater or lesser degree to each Defendant depending on the relative location of the tract, the improvements thereon and the use or uses to which the tract and the improvements thereon are put) :

(a) Defendants with houses find the houses become unsafe in which to live. Other houses become so noisy and shaken as to prohibit their being satisfactory dwellings or places within which to conduct a family life and raise children.

(b) Defendants raising crops (such as cotton) of a character to require dusting by plane are completely unable to secure the services of certain crop dusters and can secure others only upon certain week ends when it is known in advance that the jet planes will not be flying, (and then, only if the air conditions are satisfactory), causing damage to crops, making the farming thereof more expensive and precarious, and, in some cases, making lands unusable for such crops.

(c) Defendants engaged in feeding beef cattle for market must extend the feeding time period by one-third in order to make up for the two to five

week period it takes for new cattle to quiet and become partially accustomed to the noise.

(d) Defendants engaged in grazing beef cattle on alfalfa must similarly extend the duration grazing period as the cattle in the field never become completely accustomed to the noise.

(e) Defendants engaged in dairying are damaged by both lesser milk production and lowered butterfat content of milk as the result of said noise and disturbance.

(f) Defendants engaged in raising or feeding any livestock or in dairying must get rid of all temperamental animals.

(g) All defendants hereunder, allege the constant proximity of the places and the attendant noise and danger decreases the efficiency of all farm labor by at least twenty-five (25) per cent.

(h) Certain defendants whose lands lie closest to the runways find the planes so low as to eliminate all use, agricultural, domestic or otherwise, of said lands.

(i) All defendants herein find tillable hours reduced, farm machinery damaged by dropped tow targets and parts, farm values and home values diminished or destroyed, together with multiple other attendant and auxiliary damages.

XV.

Defendant, Goodyear Farms, owner of Tract Nineteen (19), said tract being a parcel of land

approximately fifteen (15) Acres in size (located as shown on "Exhibit 1" hereof), claims and alleges: That prior to the events and takings by the United States of America and the United States Air Force heretofore set forth in this Amended Notice of Appearance, said Tract Nineteen (19) had a fair market value of Five Hundred and no/100 Dollars (\$500.00) per acre. Further, that since these events, a good portion of Tract Nineteen (19) has been rendered wholly and totally useless for any purpose, agricultural, domestic or otherwise. And the remainder of said tract has been so substantially taken and natural agricultural and domestic uses to which it could and was previously put, so substantially restricted, diminished and taken as heretofore set forth in this Amended Notice of Appearance (and particularly in Paragraph VII through XIV hereof) as to give said tract a new fair market value of not to exceed One Hundred and no/100 Dollars (\$100.00). Therefore, by reason of the foregoing, defendant, Goodyear Farms, has suffered a taking resulting in damage to its above-described real property in Tract Nineteen (19) in the sum of Six Thousand and no/100 Dollars (\$6000.00).

XVI.

Defendant, B. W. Mullins, Lessee of the said Tracts Nineteen (19) and Seventeen (17) described in Article XV immediately above, claims and alleges that but for the events and takings by the United States of America and the United States Air Force heretofore set forth, he would have

planted the fifteen (15) acres, which comprise the said Tract Nineteen (19), in cotton. Because, however, planes cross Tract Nineteen (19) from the northernmost runway at levels from ten to twenty feet above the ground, and because therefore of the impossibility of securing dusting by plane, the impossibility of using either mechanical or human pickers, together with the impossibility of defoliation, defendant planted said fifteen acres of his cotton allotment in his leased land being Tract Seventeen (17). The best ground in the said Tract Seventeen (17) was, however, already planted in alfalfa and it being unsound economically to plow up the alfalfa, the cotton had to be planted in less desirable ground in Tract Seventeen (17). As planes from the northernmost runway cross Tract Seventeen (17) at levels of fifteen feet, mechanical pickers are not usable. Said defendant alleges that as the result of having to plant his cotton on poorer ground, he will lose a minimum of three quarters ($\frac{3}{4}$) of a bale per acre sustaining a total loss of about eleven and one-half ($11\frac{1}{2}$) bales, or not less than Nineteen Hundred and no/100 Dollars (\$1900) from this cause; and by being required to use hand pickers instead of mechanical pickers he will lose an added Three Hundred and no/100 Dollars (\$300.00), making a total loss to defendant, B. W. Mullins, on said Tracts Nineteen (19) and Seventeen (17), of not less than Twenty-two Hundred and no/100 Dollars (\$2200.00).

XVII.

Defendant, Goodyear Farms, owner of Tract Twenty-two (22), said Tract being a parcel of land approximately eighty (80) acres in size, (located as shown on "Exhibit 1" hereof), containing improvements consisting of a residence, dairy barn, storage sheds and corrals, claims and alleges that prior to the events and takings by the United States of America and the United States Air Force heretofore set forth in this Amended Notice of Appearance, said Tract Twenty-two (22) had a fair market value of Five Hundred and no/100 Dollars (\$500.00) per acre, and the improvements on said Tract Twenty-two (22) had a fair market value of Sixty-six Hundred and no/100 (\$6600.00) Dollars. Further, that since these events, said lands and improvements, and the natural agricultural and domestic uses to which they can be put have been so substantially restricted, diminished and taken as heretofore set forth in this Amended Notice of Appearance (and particularly in Article VI through XIV hereof) as to give the land in said tract a new fair market value of not to exceed One Hundred and no/100 (\$100) Dollars per acre, and the improvements on said tract a fair market value of not to exceed Nine Hundred and Ninety Dollars (\$990). Therefore, by reason of the foregoing, defendant, Goodyear Farms, has suffered a taking resulting in damage to its above-described real property and the improvements thereon in the sum of not less than Thirty-six Thousand One Hundred and no/100 Dollars (\$36,100.00).

XVIII.

Defendant, Goodyear Farms, owner of Tract Sixteen (16), said tract being a parcel of land approximately eighty (80) acres in size (located as shown on "Exhibit 1" hereof), claims and alleges: That prior to the events and takings by the United States of America and the United States Air Force heretofore set forth in this Amended Notice of Appearance, said Tract Sixteen (16) had a fair market value of Five Hundred and no/100 Dollars (\$500.00) per acre. Further, that since these events, a good portion of Tract Sixteen (16) has been rendered wholly and totally useless for any purpose, agricultural, domestic or otherwise. And the remainder of said tract has been so substantially taken and natural agricultural and domestic uses to which it could and was previously put, so substantially restricted, diminished and taken as heretofore set forth in this Amended Notice of Appearance (and particularly in Article VI through XIV hereof) as to give said tract a new fair market value of not to exceed One Hundred and no/100 Dollars (\$100.00). Therefore, by reason of the foregoing, defendant, Goodyear Farms, has suffered a taking resulting in damage to its above-described real property in Tract Sixteen (16) in the sum of Thirty-two Thousand and no/100 Dollars (\$32,000.00).

XIX.

Defendant, Goodyear Farms, owner of Tract Seventeen (17), said tract being a parcel of land approximately sixty-five (65) acres in size, (located

as shown on "Exhibit 1" hereof), containing improvements consisting of a residence, dairy barn, storage shed and corrals, claims and alleges that prior to the events and takings by the United States of America and the United States Air Force heretofore set forth in this Amended Notice of Appearance, said Tract Seventeen (17) had a fair market value of Five Hundred and no/100 Dollars (\$500.00) per acre, and the improvements on said Tract Seventeen (17) had a fair market value of Seven Thousand and no/100 (\$7000.00) Dollars. Further, that since these events, said lands and improvements, and the natural agricultural and domestic uses to which they can be put have been so substantially restricted, diminished and taken as heretofore set forth in this Amended Notice of Appearance, (and particularly in Article VI through XIV hereof) as to give the land in said tract a now fair market value of not to exceed Two Hundred and no/100 Dollars (\$200.00) per acre, and the improvements on said tract a fair market value of not to exceed Seventeen Hundred Fifty and no/100 Dollars (\$1750.00). Therefore, by reason of the foregoing, defendant, Goodyear Farms, has suffered a taking resulting in damage to its above-described real property and the improvements thereon in the sum of not less than Twenty-four Thousand Seven Hundred Fifty and no/100 Dollars (\$24,750.00).

XX.

Defendants, Ralph Ashby and Grace Ashby, husband and wife, as successors in interest of John

Newton Edge and Mary Elizabeth Edge, owners of Tracts Thirty-five (35) and Thirty-six (36), said tracts being two parcels of land totaling approximately one hundred twenty (120) acres in size (located as shown on "Exhibit 1" hereof) containing certain improvements consisting of a residence, two (2) dairy barns, a granary, shops, a residence for laborers and corrals, claim and allege that prior to the events and takings by the United States of America and the United States Air Force heretofore set forth in this Amended Notice of Appearance, the improvements on said Tracts Thirty-five (35) and Thirty-six (36) had a fair market value in the amount of Thirty-two Thousand and no/100 Dollars (\$32,000.00). Further, that since these events the natural agricultural and domestic uses to which these improvements can be put has been so substantially restricted, diminished and taken as heretofore set forth in this Amended Notice of Appearance (and particularly in Article VI through XIV hereof) as to give said improvements a new fair market value of not to exceed Twenty-four Thousand and no/100 Dollars (\$24,000.00). Therefore, by reason of the foregoing, defendants, Ralph Ashby and Grace Ashby, as successors in interest of John Newton Edge and Margaret Elizabeth Edge, have suffered a taking resulting in damage to their above-described real property and the improvements thereon in the sum of Eight Thousand and no/100 Dollars (\$8,000.00).

XXI.

Defendant, Adaman Mutual Water Company, an Arizona non-profit corporation, owner of Tract Twenty (20), said tract being a parcel of land totalling approximately fifteen (15) acres in size (located as shown in "Exhibit 1" hereof), containing certain improvements consisting of a club house, two (2) hay barns, storage barns, scales and corals, claims and alleges that prior to the events and takings by the United States of America and the United States Air Force heretofore set forth in this Amended Notice of Appearance, the improvements on said Tract Twenty (20) had a fair market value in the amount of Twenty-four Thousand and no/100 Dollars (\$24,000.00). Further, that since these events the natural agricultural and domestic uses to which these improvements can be put has been so substantially restricted, diminished and taken as heretofore set forth in this Amended Notice of Appearance (and particularly in Article VI through XIV hereof) as to give said improvements a now fair market value of not to exceed Twenty Thousand Four Hundred and no/100 Dollars (\$20,400.00). Therefore, by reason of the foregoing, defendant, Adaman Mutual Water Company, has suffered a taking resulting in damage to their above-described real property and the improvements thereon in the sum of Three Thousand Six Hundred and no/100 Dollars (\$3,600.00).

XXII.

Defendant, Goodyear Farms, owner of Tract Twenty-one (21), said tract being a parcel of land

totalling approximately thirty (30) acres in size (located as shown on "Exhibit 1" hereof), containing certain improvements consisting of a residence, claims and alleges that prior to the events and takings by the United States of America and the United States Air Force heretofore set forth in this Amended Notice of Appearance, the improvements on said Tract Twenty-one (21) had a fair market value in the amount of Forty-five Hundred and no/100 Dollars (\$4500.00). Further, that since those events the natural agricultural and domestic uses to which these improvements can be put has been so substantially restricted, diminished and taken as heretofore set forth in this Amended Notice of Appearance (and particularly in Articles VI through XIV hereof) as to give said improvements a new fair market value of not to exceed Three Thousand Eight Hundred Twenty-five and no/100 Dollars (\$3825.00). Therefore, by reason of the foregoing, defendant, Goodyear Farms, has suffered a taking resulting in damage to its above-described real property and the improvements thereon in the sum of Six Hundred Seventy-five and no/100 Dollars (\$675.00).

Wherefore, defendants, and each of them, pray that at the time of the trial of the issue of just compensation to be awarded each defendant appearing herein, each be permitted to present evidence to the Court as to the amount of the compensation to be paid for the property of each as set forth in this Amended Notice of Appearance and that each share

in the distribution of the award to the extent of the value of the property of each as described herein.

SNELL & WILMER,

By /s/ MARK WILMER,

Attorneys for Defendants.

[Endorsed]: Filed February 20, 1956.

[Title of District Court and Cause.]

MINUTE ENTRY OF
MONDAY, MARCH 5, 1956

Honorable Dave W. Ling, United States District Judge, presiding.

The Petition of Goodyear Farms, an Arizona corporation, Adaman Mutual Water Company, a non-profit Arizona corporation, Bill W. Mullens and Ralph Ashby and Grace Ashby, husband and wife, for Leave to File an Amended Notice of Appearance is now called for hearing.

William A. Holohan, Esq., Assistant United States Attorney, is present for the Government. Mark Wilmer, Esq., appears on behalf of the petitioners.

Said petition is argued by counsel.

It Is Ordered that said Petition for Leave to File Amended Notice of Appearance is denied.

(Docketed March 5, 1956.)

[Title of District Court and Cause.]

SECOND AMENDMENT TO COMPLAINT

Plaintiff hereby amends its complaint filed herein on November 27, 1953, in the following manner and in these particulars only:

1. Delete the legal description of Tract No. 114 found on page 2 of Schedule "A" of said complaint, and insert in lieu thereof the following legal description for said Tract No. 114:

That portion of the North half of the Southeast Quarter ($N\frac{1}{2}SE\frac{1}{4}$) of Section Seven (Sec. 7), Township Two North (T2N), Range One West (R1W), Gila and Salt River Meridian, County of Maricopa, State of Arizona, described as follows, basis of bearings being transverse Mercator Grid, Central Zone, Arizona:

Beginning at the Southeast corner of said North $\frac{1}{2}$ of the Southeast $\frac{1}{4}$ of Section 7; thence along the East line of said Section 7 North $0^{\circ} 01' 05''$ East 1321.79 feet to the East $\frac{1}{4}$ corner of said Section 7; thence along the North line of said Southeast $\frac{1}{4}$ of Section 7 North $89^{\circ} 35' 37''$ West 692.86 feet to a line which bears South $42^{\circ} 48' 58''$ West from a point distant North $0^{\circ} 01' 46''$ East 753.11 feet along the East line of said Section 7 from the said East $\frac{1}{4}$ corner of Section 7; thence Southwesterly along the said line bearing South 42°

48' 58" West, a distance of 1805.30 feet, more or less, to the South line of said North $\frac{1}{2}$ of the Southeast $\frac{1}{4}$; thence along said South line South 89° 55' 38" East 1919.42 feet, more or less, to the point of beginning.

Excepting all of that certain strip of land, approximately 45 feet wide, designated as a drainage ditch and more particularly described in a quitclaim deed from Goodyear Farms to Adaman Mutual Water Company, recorded August 4, 1953, in Docket 1180, page 528, in the office of the County Recorder of said County, lying within the boundaries of the above-described land.

Containing 38.32 acres, more or less, including 1.00 acre, more or less, in street.

The purpose of this Amendment is to increase the acreage of Tract No. 114 from 37.95 acres to 38.32 acres, pursuant to a stipulation entered into by and between plaintiff and the defendants Arthur E. Baker and Doris M. Baker, husband and wife.

JACK D. H. HAYS,

United States Attorney for
the District of Arizona;

/s/ WILLIAM A. HOLOHAN,
Assistant United States
Attorney.

[Endorsed]: Filed March 12, 1956.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between the United States of America, hereinafter called the plaintiff, and Arthur E. Baker and Doris M. Baker, husband and wife, hereinafter called the defendants, that:

Whereas, action in condemnation was commenced in the above Court on November 27, 1953, by the filing of a declaration of taking and a complaint in condemnation on behalf of the United States of America at the request of the Under Secretary of the Air Force; and

Whereas, the defendants, Arthur E. Baker and Doris M. Baker, husband and wife, have contracted to purchase the following described parcel of real estate by virtue of a certain agreement made and executed by Goodyear Farms, a Corporation, Seller, and said defendants, as Buyers, dated March 8, 1947, recorded March 13, 1947, in Book 113 of Agreements, page 243, thereafter modified and amended by certain modification of agreement dated June 1, 1947, recorded July 10, 1947, in Docket 11, page 226, Records of Maricopa County, Arizona:

Tract No. 114

That portion of the North half of the Southeast Quarter ($N\frac{1}{2}SE\frac{1}{4}$) of Section Seven (Sec. 7), Township Two North (T2N), Range One West (R1W), Gila and Salt River Meridian,

County of Maricopa, State of Arizona, described as follows, basis of bearings being transverse Mercator Grid, Central Zone, Arizona:

Beginning at the Southeast corner of said North $\frac{1}{2}$ of the Southeast $\frac{1}{4}$ of Section 7; thence along the East line of said Section 7 North $0^{\circ} 01' 05''$ East 1321.79 feet to the East $\frac{1}{4}$ corner of said Section 7; thence along the North line of said Southeast $\frac{1}{4}$ of Section 7 North $89^{\circ} 35' 37''$ West 692.86 feet to a line which bears South $42^{\circ} 48' 58''$ West from a point distant North $0^{\circ} 01' 46''$ East 753.11 feet along the East line of said Section 7 from the said East $\frac{1}{4}$ corner of Section 7; then Southwesterly along the said line bearing South $42^{\circ} 48' 58''$ West, a distance of 1805.30 feet, more or less, to the South line of said North $\frac{1}{2}$ of the Southeast $\frac{1}{4}$; thence along said South line South $89^{\circ} 55' 38''$ East 1919.42 feet, more or less, to the point of beginning.

Excepting all of that certain strip of land, approximately 45 feet wide, designated as a drainage ditch and more particularly described in a quitclaim deed from Goodyear Farms to Adaman Mutual Water Company, recorded August 4, 1953, in Docket 1180, page 528, in the office of the County Recorder of said County, lying within the boundaries of the above-described land.

Containing 38.32 acres, more or less, including 1.00 acre, more or less, in street.

and under the provisions of the Declaration of Taking Act (46 Stat. 1421), the title to the lands above described in fee simple, subject to existing easements for public roads and highways, public utilities, railroads and pipelines, vested in the United States of America, and the right to just compensation for the same was likewise, under the provisions of said Act, vested in the persons entitled thereto, and

Whereas, Arthur E. Baker and Doris M. Baker, husband and wife, were the contract purchasers of the above-described land as aforesaid.

Now, Therefore, it is hereby stipulated and agreed by and between the above-named parties that the sum of Thirty-four Thousand Seven Hundred Fifteen and No/100 (\$34,715.00) Dollars, inclusive of interest is the just compensation in full to be paid by the plaintiff for the taking and condemnation of the unencumbered fee simple title to the lands hereinbefore described, together with all improvements thereunto belonging, including crop damage and damage to the remaining land owned by the defendants, subject only to such easements as may be or have been waived by plaintiff. That the aforesaid sum shall be paid as follows:

(1) Pay to Goodyear Farms, a corporation, the sum of Five Thousand Three Hundred Fifty-one and 80/100 (\$5,351.80) Dollars, the remainder due

on the hereinbefore said contract of Four Thousand Five Hundred Eighty-three and 26/100 (\$4,583.26) Dollars and the further sum of Seven Hundred Sixty-eight and 54/100 (\$768.54) Dollars on a certain note dated October 1, 1952.

(2) Pay to Adaman Mutual Water Company, a Corporation, the sum of Three Thousand Twenty-five and 97/100 (\$3,025.97) Dollars, the remainder of assessment against the hereinbefore-described property.

(3) Pay to Arthur E. Baker and Doris M. Baker, husband and wife, the remaining Twenty-six Thousand Three Hundred Thirty-seven and 23/100 (\$26,337.23) Dollars, which includes the sum of Two Hundred Seventy and No/100 (\$270.00) Dollars as damage to remaining crops and Eleven Thousand Nine Hundred and No/100 (\$11,900.00) Dollars as severance damage to the remaining land owned by above said defendants. It is agreed that from said sum there shall first be paid any and all liens, balance due on taxes and remaining encumbrances against said land, including adverse claims or claims by lessees.

The defendants, Arthur E. Baker and Doris M. Baker, husband and wife, hereby enter their appearance in this action and expressly waive service of summons, petition and any and all other process and all right to a hearing on the petition and pleadings filed in this action and the right to the appointment of Commissioners or Jury for the determination of just compensation for said tract.

The above-named parties hereby agree to the entering of a judgment in conformity with this stipulation, fixing the value of the land hereinbefore described as recited herein, and setting forth the conditions and provisions of this stipulation.

Executed on the 1st day of June, 1954.

/s/ ARTHUR E. BAKER,

/s/ DORIS M. BAKER,

Defendants.

UNITED STATES OF
AMERICA,

JACK D. H. HAYS,

United States Attorney;

/s/ EVERETT L. GORDON,

Assistant United States

Attorney.

Approved and signed on behalf of the United States of America March 2, 1956.

[Endorsed]: Filed Mar. 12, 1956.

[Title of District Court and Cause.]

JUDGMENT IN RE TRACT No. 114

This cause coming on regularly to be heard before the Court upon a stipulation entered into by and between the defendants, Arthur E. Baker and Doris

M. Baker, his wife, and the plaintiff, United States of America, and

It appearing to the Court that the sum of \$34,610.00 has been deposited in the Registry of the Court as estimated just compensation for the taking of the following described real estate:

That portion of the North half of the Southeast Quarter ($N\frac{1}{2}SE\frac{1}{4}$) of Section Seven (Sec. 7), Township Two North (T2N), Range One West (R1W), Gila and Salt River Meridian, County of Maricopa, State of Arizona, described as follows, basis of bearings being transverse Mercator Grid, Central Zone, Arizona:

Beginning at the Southeast corner of said North $\frac{1}{2}$ of the Southeast $\frac{1}{4}$ of Section 7; thence along the East line of said Section 7 North $0^{\circ} 01' 05''$ East 1321.79 feet to the East $\frac{1}{4}$ corner of said Section 7; thence along the North line of said Southeast $\frac{1}{4}$ of Section 7 North $89^{\circ} 35' 37''$ West 692.86 feet to a line which bears South $42^{\circ} 48' 58''$ West from a point distant North $0^{\circ} 01' 46''$ East 753.11 feet along the East line of said Section 7 from the said East $\frac{1}{4}$ corner of Section 7; thence Southwesterly along the said line bearing South $42^{\circ} 48' 58''$ West, a distance of 1780.64 feet, more or less, to the south line of said North $\frac{1}{2}$ of the Southeast $\frac{1}{4}$; thence along said South line South $89^{\circ} 22' 54''$ East 1902.76 feet, more or less, to the point of beginning.

Excepting all of that certain strip of land approximately 45 feet wide, designated as a drainage ditch and more particularly described in a quitclaim deed from Goodyear Farms to Adaman Mutual Water Company, recorded August 4, 1953, in Docket 1180, page 528, in the office of the County Recorder of said County, lying within the boundaries of the above-described land.

Containing 37.95 acres, more or less, including 1.00 acre, more or less, in street.

It further appearing to the Court that the plaintiff has amended its complaint condemning the following described property:

That portion of the North half of the Southeast Quarter ($N\frac{1}{2}SE\frac{1}{4}$) of Section Seven (Sec. 7), Township Two North (T2N), Range One West (R1W), Gila and Salt River Meridian, County of Maricopa, State of Arizona, described as follows, basis of bearings being transverse Mercator Grid, Central Zone, Arizona:

Beginning at the Southeast corner of said North $\frac{1}{2}$ of the Southeast $\frac{1}{4}$ of Section 7; thence along the East line of said Section 7 North $0^{\circ} 01' 05''$ East 1321.79 feet to the East $\frac{1}{4}$ corner of said Section 7; thence along the North line of said Southeast $\frac{1}{4}$ of Section 7 North $89^{\circ} 35' 37''$ West 692.86 feet to a line which bears South $42^{\circ} 48' 58''$ West from a

point distant North $0^{\circ} 01' 46''$ East 753.11 feet along the East line of said Section 7 from the said East $\frac{1}{4}$ corner of Section 7; thence Southwesterly along the said line bearing South $42^{\circ} 48' 58''$ West, a distance of 1805.30 feet, more or less, to the South line of said North $\frac{1}{2}$ of the Southeast $\frac{1}{4}$; thence along said South line South $89^{\circ} 55' 38''$ East 1919.42 feet, more or less, to the point of beginning.

Excepting all of that certain strip of land, approximately 45 feet wide, designated as a drainage ditch and more particularly described in a quitclaim deed from Goodyear Farms to Adaman Mutual Water Company, recorded August 4, 1953, in Docket 1180, page 528, in the office of the County Recorder of said County, lying within the boundaries of the above-described land.

Containing 38.32 acres, more or less, including 1.00 acre, more or less, in street.

It further appearing to the Court that the monies deposited in the Registry of the Court, namely, \$34,610.00, have been paid pursuant to the orders heretofore entered herein on January 15, 1954; June 9, 1954, and June 22, 1954,

It Is Ordered, Adjudged and Decreed that:

(1) The sum of \$34,715.00, inclusive of interest, is the reasonable and just compensation to be paid in full for the unencumbered fee simple title to the 38.32 acres, more or less, including 1.00 acre, more or less, in street, together with all improvements

thereunto belonging, including crop damage and damage to the remaining land owned by the defendants, subject to existing easements for public roads and highways, public utilities, railroads and pipelines;

(2) The plaintiff is ordered and directed to pay into the Registry of this Court for the persons entitled thereto the sum of \$105.00;

(3) Simultaneously upon the payment by the plaintiff of the sum of \$105.00 into the Registry of the Court as aforesaid all valid claims and liens of whatsoever nature against said lands shall be transferred from said lands to the funds so deposited in the Registry of the Court to the end that the United States of America will take an unencumbered fee simple title to the whole of said 38.32 acres, more particularly described herein on page 2, free and clear of all liens and claims whatsoever.

(4) This Court retains jurisdiction for the purpose of entertaining such further orders and decrees as may be necessary in the premises, including an adjudication of the rights of the respective claimants in and to the funds to be deposited in the Registry of this Court by the plaintiff in satisfaction of the award herein made.

Dated this 12th day of March, 1956.

/s/ DAVE W. LING,

Judge, United States District Court for the District of Arizona.

[Endorsed]: Filed Mar. 12, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Goodyear Farms, an Arizona corporation; Adaman Mutual Water Company, a non-profit Arizona corporation; Bill W. Mullins and Ralph Ashby and Grace Ashby, husband and wife, defendants in the above-entitled action, hereby appeal to the United States Court of Appeals for the Ninth Circuit from that certain order made and entered by the above-entitled Court in the above-entitled cause on March 5, 1956, denying the petition of said defendants for leave to file an amended notice of appearance.

Dated this 26th day of March, 1956.

SNELL & WILMER,

By /s/ MARK WILMER,

Attorneys for Defendants
Above Named.

[Endorsed]: Filed March 28, 1956.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

We, the undersigned, Goodyear Farms, an Arizona corporation; Adaman Mutual Water Company, a non-profit Arizona corporation; Bill W. Mullins and Ralph Ashby and Grace Ashby, husband and wife, as Principals, and Fidelity and Deposit Com-

pany of Maryland, a corporate surety, as Surety, jointly and severally acknowledge that we and our heirs, personal representatives, successors and assigns are bound to pay to the United States of America, plaintiff in the above-entitled cause, the sum of Two Hundred Fifty Dollars (\$250).

The condition of this bond is that whereas the above-named defendants, Goodyear Farms, an Arizona corporation; Adaman Mutual Water Company, a non-profit Arizona corporation; Bill W. Mullins and Ralph Ashby and Grace Ashby, husband and wife, have appealed to the Court of Appeals for the Ninth Circuit by Notice of Appeal filed March 28, 1956, from the order entered by this Court on March 5, 1956, denying the petition of said defendants for leave to file an amended notice of appearance, if said defendants shall pay all costs adjudged against them if the appeal is dismissed or the action of this Court in denying said petition is upheld, then this bond is to be void, but if the above-named defendants fail to perform this condition, payment of the amount of this bond shall be due forthwith.

Dated March 28, 1956.

GOODYEAR FARMS, an Arizona Corporation;
ADAMAN MUTUAL WATER COMPANY,
a Non-Profit Arizona Corporation; BILL W.
MULLINS; RALPH ASHBY and GRACE
ASHBY, Husband and Wife;

By /s/ MARK WILMER,
Their Attorney.

[Seal]

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,By /s/ C. A. DRUMMOND,
Attorney in Fact.

[Endorsed]: Filed March 29, 1956.

[Title of District Court and Cause.]CLERK'S CERTIFICATE TO
RECORD ON APPEALUnited States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case No. Civ. 1949 Phoenix, United States of America, Plaintiff, vs. 238.77 Acres of Land, et al., Defendants, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing copies of the minute entries are true and correct copies of the originals thereof remaining in my office in the City of Phoenix, State and District aforesaid.

I further certify that the documents hereto annexed, numbered 1 to 15, inclusive, constitute the

record on appeal in the matter of the Motion for Intervention of Adaman Mutual Water Co., et al., pursuant to the designations filed in said case, to wit:

1. Complaint of Plaintiff.
2. Declaration of Taking.
3. Motion for Order for Delivery of Possession.
4. Order for Delivery of Possession.
5. Judgment on Declaration of Taking, June 15, 1954.
6. Motion for Intervention and Proposed Petition for Intervention.
- 6-a. Plaintiff's Objections to Motion of Adaman Mutual Water Company, a Corporation, and Its Stockholders to Intervene.
7. Minute Orders of
 - (a) January 24, 1955;
 - (b) December 29, 1955 (Order Denying Motion for Intervention).
8. Notice of Appeal.
9. Bond for Costs on Appeal.
10. Concise Statement of Points to Be Relied Upon on Appeal.
11. Designation of Contents of Record on Appeal.
12. Amended Designation of Contents of Record on Appeal.
13. Counterdesignation of Contents of Record on Appeal.
14. Order Extending Time to Docket Appeal.
15. Order Extending Time to Docket Appeal and Authorizing Clerk to Consolidate Record.

I further certify that the documents hereto annexed, numbered 16 to 28, inclusive, constitute the record on appeal in the matter of the Petition of Goodyear Farms, et al., for Leave to File Amended Appearance, pursuant to the designations filed in said case, to wit:

16. Complaint of Plaintiff (being the same as document No. 1 above).

17. Declaration of Taking (being the same as document No. 2 above).

18. Motion for Order for Delivery of Possession (being the same as document No. 3 above).

19. Order for Delivery of Possession (being the same as document No. 4 above).

20. Judgment on Declaration of Taking, June 15, 1954 (being same as document No. 5 above).

21. Petition of Goodyear Farms, et al., for Leave to File Amended Appearance.

22-a. Minute Entry of January 24, 1955 (being the same document as item No. 7-a above).

22-b. Minute Entry of December 29, 1955 (being the same document as item No. 7-b above).

22-c. Minute Entry of March 5, 1956 (Order Denying Petition for Leave to File Amended Appearance).

23. Notice of Appeal.

24. Bond of Costs on Appeal.

25. Concise Statement of Points to Be Relied Upon on Appeal.

26. Appellants' Designation of Contents of Record on Appeal.

27. Appellee's Counterdesignation of Contents of Record on Appeal.

28. (1) to (69). All original documents filed in the case, other than documents numbered 1 to 27 described above, consisting of 69 documents, which are transmitted pursuant to Appellee's Counterdesignation in the matter of the Petition for Leave to File Amended Appearance.

Witness my hand and the seal of said Court this 23rd day of April, 1956.

[Seal] /s/ WM. H. LOVELESS,
Clerk.

[Endorsed]: No. 15,113. United States Court of Appeals for the Ninth Circuit. Goodyear Farms, a Corporation; Adaman Mutual Water Company, a Corporation; B. W. Mullins, James H. Sharp, George W. Busey, Carlon H. Hinton and Verna Hinton, His Wife, et al., Appellants, vs. United States of America, Appellee. Goodyear Farms, a Corporation; Adaman Mutual Water Company, a Corporation; Bill W. Mullins and Ralph Ashby and Grace Ashby, Husband and Wife, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed April 25, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15,113

GOODYEAR FARMS, an Arizona Corporation,
et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

CONCISE STATEMENT OF POINTS TO BE
RELIED ON BY APPELLANTS ON AP-
PEAL

Appellants, Goodyear Farms, an Arizona corporation; Adaman Mutual Water Company, an Arizona non-profit corporation, on behalf of itself and its stockholders, B. W. Mullins, James H. Sharp, George W. Busey, Carlon H. Hinton and Verna Hinton, his wife; Harold Ralph Hunt and Georgia May Hunt, his wife; George Reisemann and Joanna Reisemann, his wife; Raymond Austerman and Zula Austerman, his wife; Leon Fort and Doris C. Fort, his wife; John Newton Edge and Mary Elizabeth Edge, his wife, will raise and rely upon the following points upon the appeal of this matter:

1. The United States of America may not, by only setting forth a portion of the property and property rights taken in its suit in condemnation, shut out property owners whose property rights

are in fact invaded, from having their claims adjudicated in connection with such condemnation suit and appropriate compensation awarded for all rights taken.

2. The reduction in the original acreage of Adaman Mutual Water Company resulting in depriving that company of the full amount of acreage necessary to carry the lien imposed upon the original acreage for construction and other costs, constitutes a taking of property and to the extent that the lien is destroyed through a reduction in the original acreage such reduction constitutes a taking and is compensable in the condemnation suit in which such acreage loss is made effective. Such reduction in the original acreage further deprives the company of the right to levy and collect assessments for maintenance and replacements from the full amount of the original acreage and such reduction in assessments constitutes a taking and is compensable in the condemnation action wherein such reduction in acreage is effected.

3. Avigation easements over and across the land of persons named as defendants in a condemnation suit for use of jet planes are compensable in a condemnation action giving rise to such avigation uses even though not specifically described therein. Take-off of jet planes over and across lands at frequent intervals flying at a low elevation resulting in noise, fumes and similar disturbances, making the land below such use less valuable, including the dropping of target wires and other encumbrances, constitutes

a taking of property for which the defendants are entitled to compensation in the action giving rise to such use of said lands.

4. A defendant in a condemnation action is not limited to the statement of the taking set forth in the complaint and if in fact as a part of the taking set forth in the complaint, additional and further property and property rights of said defendant are taken for use of the party exercising the right of condemnation, such rights may be set up in such condemnation action and proper compensation secured therefor.

Dated this 2nd day of May, 1956.

Respectfully submitted,

SNELL & WILMER,

By /s/ MARK WILMER,

Attorneys for Appellants

Above Named.

Service of copy acknowledged.

[Endorsed]: Filed May 3, 1956.

[Title of Court of Appeals and Cause.]

CONCISE STATEMENT OF POINTS TO BE
RELIED ON BY APPELLANTS ON AP-
PEAL

Appellants, Adaman Mutual Water Company, a non-profit Arizona corporation; Goodyear Farms,

an Arizona corporation; Bill W. Mullins and Ralph Ashby and Grace Ashby, husband and wife, will raise and rely upon the following points upon the appeal of this matter:

[Points 1, 2, 3 and 4 are identical with same numbered points appearing on pages 228 to 230, and are not reprinted here.]

5. Defendants in their proposed amended appearance sought to put the Government on notice as to the issues and evidence which defendants would offer on the trial of the action to obviate any claim on the part of the Government of surprise and for the purpose of obtaining a preliminary determination by the Court of the issues and claims to compensation which would be heard on the trial of the action.

Dated this 2nd day of May, 1956.

Respectfully submitted,

SNELL & WILMER,

By /s/ MARK WILMER,

Attorneys for Appellants
Above Named.

Service of copy acknowledged.

[Endorsed]: Filed May 3, 1956.

No. 15113

IN THE

United States Court of Appeals

For the Ninth Circuit

1956 TERM

GOODYEAR FARMS, a corporation;
ADAMAN MUTUAL WATER COM-
PANY, a corporation; B. W. MUL-
LINS, JAMES H. SHARP, GEORGE
W. BUSEY, CARLON H. HINTON
and VERA HINTON, his wife, et
al,

Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

GOODYEAR FARMS, a corporation;
ADAMAN MUTUAL WATER COM-
PANY, a corporation; BILL W.
MULLINS and RALPH ASHBY and
GRACE ASHBY, husband and wife,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

*Appeal from the United
States District Court for
the District of Arizona*

FILED

AUG 18 1956

PAUL P. O'BRIEN, CLERK

BRIEF OF APPELLANTS

SNELL & WILMER
Attorneys for Appellants

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IN THE
United States Court of Appeals

For the Ninth Circuit

1956 TERM

GOODYEAR FARMS, a corporation;
ADAMAN MUTUAL WATER COM-
PANY, a corporation; B. W. MUL-
LINS, JAMES H. SHARP, GEORGE
W. BUSEY, CARLON H. HINTON
and VERA HINTON, his wife, et
al,

Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

GOODYEAR FARMS, a corporation;
ADAMAN MUTUAL WATER COM-
PANY, a corporation; BILL W.
MULLINS and RALPH ASHBY and
GRACE ASHBY, husband and wife,

Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 15113

*Appeal from the United
States District Court for
the District of Arizona*

BRIEF OF APPELLANTS

JURISDICTION

This is an appeal from two orders entered in this proceeding in the District Court of Arizona, at Phoenix, Arizona. The action was originally brought by the United States of America to condemn the fee title to certain lands in Maricopa County, Arizona, for the United States Air Force.

The first of the orders appealed from is one wherein the Court denied the petition of 35 petitioners who sought to interevene for the purpose of recovering in the condemnation action compensation for property and property rights which were in fact taken from them by the plaintiff in the course of development and use of the property actually condemned, but which were not described in plaintiff's complaint nor included in the declaration of taking.

The second order is one wherein five defendants in the condemnation action (who had also been petitioners in the intervention proceeding) sought permission to file an amended appearance therein, setting forth their respective additional claims for compensation for property and property rights taken from them by the plaintiff, which property and rights were not described in plaintiff's complaint nor included in the declaration of taking.

The District Court refused to permit the intervention by its order entered December 29, 1955 (T.R. 184, 185) and denied the motion of the five defendants for leave to file an amended appearance alleging the full extent of taking by the government in its development of Luke Field on March 5, 1956. (T.R. 210) Notice of Appeal was filed, with respect to the order of December 29, 1955, on January 26, 1956, (T.R. 185) and with respect to the order of March 5, 1956, on March 28, 1956. (T.R. 222)

This appeal is predicated on 28 U.S.C. Sec. 1291.

STATEMENT OF THE CASE

These two appeals have by stipulation been consolidated for presentation to this Court.

There are two separate legal questions involved in this consolidated appeal. One concerns the denial of a petition to interevene by 35 petitioners which, under the Rules of Procedure, may have been a denial of intervention which was a matter of right, under Rule 24(a), or the denial may have been ordered under 24(b), where the Court exercised its discretion.

The other legal question concerns the denial of the petition to file an amended appearance, by five of the defendants in the condemnation action.

While there may be some difference between the right of an intervener, who is not a party, to come into an action, as opposed to the right of one already a party to file an amended appearance, we believe many of the basic legal questions are common to both in this proceeding.

We are, therefore, filing a single brief in the interest of brevity and will discuss both questions herein.

The orders of the District Court were minute orders and read:

As to the petitioning interveners:

"It is ordered that the Motion for Intervention of Adaman Mutual Water Company, an Arizona non-profit corporation on behalf of itself and its stockholders; Goodyear Farms, an Arizona corporation; Harry A. Kandarian and Bernita Kandarian, husband and wife; Peter Nalbandian, as his sole and separate property; Joseph E. Bulfer and Mary Bulfer, husband and wife; Calvin F. Jones and Margaret Jones, husband and wife; Jonathan Thomas Rogers, a single man; Jefferson Z. Rogers, a married man; John Newton Edge and Margaret Elizabeth Edge, husband and wife; Harold Ralph Hunt and Georgia May Hunt, husband and wife; George Reismann and Joanna Reismann, husband and wife; Lee Weldon Merritt and Peggy Childers Merritt, husband and wife; Raymond F. Austerman and Zula Austerman, husband and wife; John A. Sellers and Maxine Sellers, husband and wife; Marshall E. Manley and Mary Elizabeth Manley, husband and wife; Myron M. Mitchell and Irene Mitchell, husband and wife; Henry Hallam Hestand and Martha Sue Hestand, husband and wife; Chester Elwood Hunt and Mary Virginia Hunt, husband and wife; Olliver Kissling and Peggy Jean Kissling, husband and wife; Albert C. Lueck and Melva Lueck, husband and wife; Ralph Ashby and Grace Ashby, husband and wife; Leon Fort and Doris C. Fort, husband and wife; Carlon A. Hinton and Verna Hinton, husband and wife; Roy Sheppard and Dora L. Sheppard, husband and wife; Herman Eaton and Dorothy Eaton, husband and wife;

J. Elmer Woodward and Bernice Woodward, husband and wife; Juan Brashears and Betty Brashears, husband and wife; J. L. Bunker and Kathryn Bunker, husband and wife; Leon G. Gailey, Archer W. Seaver, Ray M. Lorette, George W. Busey, B. W. Mullins, James H. Sharp and Jewell J. Stone, is denied."

As to the Defendants:

"It is Ordered that said Petition for Leave to File Amended Notice of Appearance is denied."

Basically, in summary, two questions are presented:

1. In a situation where the Federal Government files a condemnation action but fails to fairly describe all property and property rights in fact taken through the activity carried on by the government on and from the lands condemned and fails to name as defendants owners of property and property rights in fact taken by the government through the carrying on of the activity which gives rise to the condemnation action, may (or must) the owners of such property and property rights, in fact taken, intervene and become parties to the condemnation action for the purpose of securing fair compensation for their property and property rights, in fact, preempted, by the government?

2. In a situation where the Federal Government brings a condemnation action but fails to fairly describe all of the property and property rights which the government has in fact preempted through the activity giving rise to the condemnation action may (or must) a defendant therein broaden the condemnation issue as laid by the government in its complaint by appearing, not only for the property and property rights which the government has elected to recognize as taken in its complaint, but also for the connected and related property and property rights in fact taken?

SPECIFICATIONS OF ERROR RELIED UPON

I

The District Court erred in denying petitioners' Petition to Intervene in this action for the reasons:

(a) Petitioners and defendants are not adequately represented, and they will or may be bound by a judgment in the action, and

(b) Petitioners' and defendants' claims and the main actions have questions of law and fact in common.

II

The District Court erred in denying defendants' Motion to File an Amended Appearance for the reasons:

(a) Defendants may be estopped by a judgment in this action from asserting their claims for additional compensation in independent actions filed by such defendants;

(b) A defendant in a condemnation action may recover in such action all severance or consequential damages to his remaining lands resulting from the use made by the condemnor of the lands taken from such defendant.

SUMMARY OF ARGUMENT

The petitioning interveners and defendants, including Adaman Mutual Water Company, as either owners, lessees or contract purchasers of lands which are contiguous or in close proximity to the lands condemned by the United States, submit that they are legally entitled to obtain compensation from the United States in the condemnation action for damage suffered by them.

Adaman Mutual Water Company, a non-profit corporation, seeks additional compensation by reason of the reduction of 8.3% in the acreage served by it, this being the percentage of the acreage it serves which was condemned.

Continuous flights of low-flying jet planes constitute a taking of the lands underneath to the same extent as though physical possession had been taken of such lands.

The United States could not escape liability for damages to those lands over which its planes continuously fly at low elevations by merely refusing to include such lands in its condemnation proceedings.

Having instituted a condemnation action to secure certain lands for airfield purposes, owners of lands which are or will be damaged by the use to which the condemned lands are or will be put, may seek compensation in the condemnation action.

Neither Rule 71A, nor the Declaration of Taking Act prohibit the presentation by, or payment of, claims to owners of property which in fact was taken, although not described in the condemnation proceeding. Both Rule 71A and the Declaration of Taking Act contemplate that all property taken for a project shall be described and taken in a single proceeding. Neither the rule nor the statute contemplates the taking of part of the needed lands by condemnation with another portion in fact taken but not described in the proceedings; thus compelling the owners of this latter property to file actions individually to recover the damages suffered by them.

It may be the petitioning interveners did not have an absolute right to intervene. However, accepting the allegation of the petition for intervention as true, for the purpose of allowing or denying the petition, and recognizing the rights and interests of these petitioners in connection with the obligations of the United States to ultimately compensate them for any property taken, the decision of the lower court denying any relief to the petitioners was an abuse of the discretion vested in the District Court.

Those appellants who were defendants in the original proceedings take the position that they have a right to seek compensation for property taken, even though it was not described in the Declaration of Taking. They believe Rule 71A does not preclude such claims, but encourages them, and that the Declaration of Taking Act, if used, must include all of the property taken, as takings without benefit of any rule or statute are not recognized. These defendants believe they must proceed in the condemnation action with their claims for additional compensation or be barred from asserting them in an independent action.

Certainly where a portion of an individual's farm or other recognized unit of land is taken and such portion of land is there-

after used as an essential, key part of the project undertaken by the condemnor, and where the normal operation of such project materially lessens the value of the remaining lands of the owner, the owner is entitled to severance or consequential damage to reimburse him for such loss in addition to the market value of the lands taken.

In any event, petitioners in intervention and defendants appealing are faced with the possibility of a defense in further prosecuting their claims in other forums that the orders entered, since they do not specify the grounds for denying the relief sought, constitute an adjudication that, in fact, no compensable claim is shown by the pleading, which adjudication for lack of timely appeal, has become final.

Hence this appeal.

ARGUMENT

In this action the United States condemned approximately 239 acres of land in Maricopa County, Arizona, approximately 233 acres of which lie within the boundaries of Adaman Reclamation Project. The condemned land was taken and is being used for extended and improved runways and facilities of Luke Air Force Base at Litchfield Park, Arizona.

The Adaman Project obtains water for the irrigation of the lands therein from Adaman Mutual Water Company, a non-profit corporation, which is owned by the owners of the lands within the Project. The Project originally and prior to this condemnation consisted of approximately 2831 acres. (Petition for Intervention, paragraph III, T.R. 41 et seq.)

Some of the lands within the Project are owned in fee, some are held under contracts of purchase and some are occupied under leases from the owners thereof. (T.R. 43 et seq.)

The petitioners and defendants therefore consist of the Adaman Mutual Water Company, which claims damages because of reduction of the acreage of the Project by approximately 8.3%;

Goodyear Farms, an Arizona corporation, as a landowner, and various individual owners, contract purchasers and lessees of lands adjacent to the runways and the lands condemned. The lands of all petitioners and defendants lie within the Project. Of the 35 petitioners for intervention, 6 also appear as defendants in the original condemnation proceeding. Other than Adaman Mutual Water Company and Goodyear Farms, 9 petitioners for intervention are owners of the fee title to their lands; 14 are contract purchasers; 8 are lessees, and 1 owns the fee title to land and is also a contract purchaser of other land; and 1 owns the fee title to land and is also a lessee of other land. (Petition for Intervention, paragraph V, T.R. 42 et seq.)

CLAIMS OF DAMAGE

The claims for damages of the petitioners and defendants are divided into two classes. For want of better designations, these are referred to in the Petition for Intervention and Motion to File Amended Appearance as "Eight Percent Taking" and "Aircraft Taking." They may be briefly described as follows:

"EIGHT PERCENT TAKING." The Adaman Mutual Water Company serves only Project lands. All stock is owned by owners of Project lands in proportion of the acreage owned by each. The stock is appurtenant to the land and is transferred when the land is sold. Neither the stock nor the land may be transferred independently of the other. The original cost of the Company's wells, canals, ditches, pumps, etc. and the costs of maintenance and operation are liens upon the lands and the stock. Because the United States has taken approximately 8.3% of such lands with the stock automatically following the land and because of the refusal of the United States to assume the obligation to pay this percentage of these annual maintenance and operation charges, the remaining 91.7% of such lands and stock are left with this added burden. These charges will not be decreased by reason of the decrease in the area of the Project. (Petition for Intervention, paragraph IX, T.R. 50 et seq.) There are no lands which can be added to the

Project to take the place of the condemned lands. (T.R. 49, Par. VIII, Petition for Intervention)

"*AIRCRAFT TAKING.*" The take-offs and landings of approximately 400 jet planes per day have damaged the adjacent lands of the petitioners and defendants in varying degrees from a high where lands immediately adjoining the runways have become unfit for any purpose, to a low of minor damage where lands are sufficiently removed from the runways to be less affected by such flights. The character of the damage is a "taking" because the land has been made unfit or less fit for its intended and historic uses thereby. (Petition for Intervention, paragraphs XI - XIV inclusive, T.R. 51 et seq.)

PETITIONERS' AND DEFENDANTS' THEORY OF THE CASE

The United States has condemned and taken certain lands in order that Luke Field runways may be extended to make possible take-offs and landings by jet planes. The obligation to pay for the land comprising the runways and of which physical possession has been taken is admitted by the United States, but no such obligation is admitted as to the land over which the planes fly at an elevation as low as 10 feet when they leave the condemned land.

It is the petitioners' and defendants' position that this land over which several hundred jet planes fly almost daily at heights as low as 10 feet is just as completely taken as that which underlies any portion of the surfaced runways. If this be true then the taking of or damage to other adjacent lands over which the planes fly at higher elevations (yet elevations low enough so as to still substantially diminish the usefulness of the land) becomes only a question of the degree of such taking or damage.

It has long been recognized that if the air space above a landowner's property is used in such fashion as to interfere with his beneficial use of his land, a trespass results. (*Hinman vs. Pacific Air Transport*, 9th Circuit, 84 F. 2d 755.) Some other decisions

are: *Guith vs. Consumers Power Co.*, 36 Fed. Supp. 21; *Cory vs. Physical Culture Hotel*, 14 Fed. Supp. 977; *Vanderslice vs. Shawn*, 27 A. 2d 87 (Delaware); *Burnham vs. Beverly Airways*, 42 N.E. 2d 575 (Mass.); *Restatement of Torts*, Sec. 159; *Brandes vs. Mitterling*, 196 P. 2d 464, 67 Ariz. 349; *United States vs. Causby*, 328 U.S. 256, 90 L. ed. 1206, 328 S. Ct. 256. The facts in each case determine whether substantial taking or damage has been done to the landowner. There can be no doubt that flights of modern jet airplanes at the rate of one or more a minute for several hours each day would be more than a mere trespass and would substantially damage the land adjoining the end of the take-off runway from which these planes fly.

Whether this constitutes a taking, whether it is classed as an easement or whether it is designated by some other name, the landowner suffers direct and measurable damage to his property for which he is entitled to be compensated. In any event the constant flights across properties in such manner as to deprive the owners of profitable use thereof would constitute an appropriation of their properties for which compensation should be made. *Portsmouth Harbor L & H Co. vs. U.S.*, 67 L. ed. 289, 39 S. Ct. 399, 250 U.S. 1; *United States vs. Causby*, *supra*.

Petitioners and defendants also allege that the cost to the Project of supplying water to the remaining lands in the Project will be substantially the same as before 8.3% of such lands were removed therefrom. The Project was originally designed to operate as a unit, so that the number of miles of laterals and ditches to be maintained will be substantially the same, as will the number of wells, pumps and motors to produce the water for irrigation and domestic purposes. Thus the remaining 91.7% of the lands of the Project will be subjected to the burden of paying the additional 8.3% of the maintenance costs formerly borne by the lands taken by the United States. (Petition for Intervention, paragraphs IX and X, T.R. 50.) That compensation for this taking may be had in this proceeding is supported by the following cases: *United States vs. Certain Lands at Great Neck*, 49 Fed. Supp. 265; *United States*

vs. Certain Parcels of Land in Fairfax County, 89 Fed. Supp. 567 and 571; 196 F. 2d 657; *United States vs. Aho*, 68 Fed. Supp. 358; *United States vs. Florea*, 68 Fed. Supp. 367; See also *United States vs. 11.06 Acres of Land*, 89 Fed. Supp. 852.

We are unable to determine the specific grounds upon which the District Court based its two orders wherein it denied the petition for intervention and the motion to file an amended appearance, as the grounds for the denials are not indicated in the orders.

Granting or denying intervention under certain conditions is a matter within the sound discretion of the District Court and under other conditions intervention is a matter of right. (Rule 24, Rules of Civil Procedure for United States District Courts) However, the right of a landowner to recover severance or consequential damage to his remaining lands may not be denied if in fact such damage exists and was occasioned under circumstances giving rise to a legal obligation on the part of the condemnor to pay therefor. *Boyd vs. United States*, 222 F. 2d 493, C.C.A. 8)

It appears from the Complaint (T.R. 3), the Declaration of Taking (T.R. 14) and judgments relating to the various described tracts of land taken, totaling 239 acres, that Goodyear Farms was the owner and either the lessor or seller under a contract of sale of tracts numbered 113, 114, 115, 116, 117 and 118 totaling 212.63 acres. (Map, T.R. 74)

It further appears from this map of the airfield attached to the Petition for Intervention that these tracts and particularly tracts 114, 115 and 116 were used by the Air Force for the construction thereon of approximately 2600 feet of one runway, if the scale on such map of 1320 feet to one inch is accepted as correct. (Tract 114 is described as 37.95 acres of N $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 7 and tracts 115 and 116 as S $\frac{1}{2}$ SE $\frac{1}{4}$ and N $\frac{1}{2}$ NE $\frac{1}{4}$ of Sections 7 and 18 respectively.) (T.R. 6)

It also appears from this map that Goodyear Farms is the present owner of tracts described thereon as numbers 16, 17, 19,

21 and 22, and is either the lessor thereof or the seller under a contract of purchase.

In defendants' amended notice of appearance, (T.R. 191) defendants, including Goodyear Farms, claimed and sought damages for a diminution in value of its remaining lands by reason of the severance therefrom of the taken lands and by reason of the use made of such taken lands for the construction thereon of approximately one-half mile of runway for the airfield.

The United States filed objections to petitioners' intervention in the District Court, and assuming that the Court's orders were based upon one or more of these objections, we will discuss them with other matters included in this brief.

OBJECTIONS OF UNITED STATES

The principal objections made by the United States to intervention by the petitioners before the District Court were the following:

1. THE PARTIES SEEKING INTERVENTION HAVE NOT ALLEGED ANY OF THE ESSENTIAL GROUNDS FOR INTERVENTION AS SET FORTH IN RULE 24 OF THE FEDERAL RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS.
2. THE COURT IS WITHOUT JURISDICTION TO GIVE THE RELIEF SOUGHT BECAUSE THE PARTIES SEEKING INTERVENTION ARE IN EFFECT ATTEMPTING TO MAKE A COUNTERCLAIM AGAINST THE UNITED STATES OF AMERICA IN THAT THEY SEEK A JUDGMENT COMPELLING PAYMENT OF JUST COMPENSATION FOR PROPERTY NOT INCLUDED IN THE DECLARATION OF TAKING.
3. RULE 71A OF THE FEDERAL RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS ESTABLISHING PROCEDURE IN CON-

DEMPTION OF PROPERTY IN SECTION (E) THEREOF PRECLUDES ANY PLEADING OTHER THAN COMPLAINT AND ANSWER THERETO.

4. THE ALLEGATION THAT INTERVENTION IS THE ONLY PROCEDURE BY AND UNDER WHICH RELIEF CAN BE HAD IS WITHOUT MERIT.

The United States claimed in the Court below that Adaman Mutual Water Company, a non-profit corporation, (hereinafter sometimes referred to as "Adaman") is a defendant and that a petition to intervene must show affirmatively that intervention is reasonably necessary to protect petitioners' rights.

Appellants in reply, call attention to the fact that Adaman, which was the owner in fee of certain lands which were taken, also claims an additional right to compensation for its loss described as the "8.3% Taking." This latter taking was not included in the Declaration of Taking filed by appellee.

Other defendant petitioners whose lands were also included in the Declaration of Taking appeared and claimed damages by reason of aircraft flights over their remaining lands. Still other petitioners who were not parties to the original motion also claimed compensation for similar takings. (Petition for Intervention, paragraph V, T.R. 42 et seq.)

All petitioners, including Adaman, have alleged these and other facts, which if accepted as true for the purpose of petitioners' motion, certainly show affirmatively that intervention is reasonably necessary for the protection of all petitioners' interests.

No stockholders of Adaman as such seek intervention on behalf of the Company as the Company proposes to represent all of its stockholders. (Petition for Intervention, paragraph V, T.R. 42 et seq.)

Appellee also relied upon Rule 24(a) 3, that to intervene as a matter of right the applicant must be so situated as to be adversely affected by a distribution of the property in the custody of the

court, and that petitioner's interest be such that he will gain or lose by the direct operation of the judgment. It must be recognized that 7 of the 16 tracts of land referred to in the Petition for Intervention are owned by defendants in the original action. These petitioners, with their co-petitioners, sought damages for "takings" which were not described or admitted in the Declaration of Taking but which arose solely by reason of the taking and the use which appellee has and will continue to make of the land taken under the Declaration of Taking.

That the original defendants have a vital interest in the disposition of the condemnation fund is obvious and that the other petitioners who have and will continue to suffer damage to their lands and property by reason of the taking and the subsequent use of the lands taken, appears equally obvious because if they fail to make their claims in this action they may well be barred from instituting independent, individual actions at some later date and under some other statute.

Intervention may also be allowed under Rule 24(b) 2, when "Applicant's claim or defense and the main action have a question of law or fact in common."

Since petitioners' claims arise out of the condemnation proceeding and result from the single Declaration of Taking by the United States, a common question of law and fact exists.

All damage suffered by all defendants and all petitioners is occasioned by the occupation and use of the condemned land as an airfield for the take-off and landing of jet aircraft. Some petitioners were damaged by having the physical possession of their lands taken and the fee title transferred to the plaintiff. Some petitioners have suffered loss of use of their lands without loss of title. Adaman has lost the right to assess those lands, the title to which has passed to the plaintiff.

However, except for Adaman, the damage in each instance is of the same character; it is occasioned by the same source and only differs in degree as to the various individuals. Even as to

Adaman, the damage, though of a different character, is occasioned by the same set of circumstances and events.

Under Rule 71(b) the plaintiff may join in the same action one or more separate pieces of property without regard to ownership or the use to be made thereof.

Under Subdivision (c)(2) the complaint must describe the interests to be acquired and as to each separate piece of property a designation of the owner. Provision is also made that prior to any hearing all persons *having* or *claiming* an interest whose names can be discovered *by search* or *otherwise* shall be added as defendants.

Under Subdivision (d)(1) defendants subsequently added shall be served with process identifying the property and interest to be condemned and under (e) defendants are allowed to answer and shall identify the property claimed by the answering defendant, the nature and extent of the interest claimed and state all defenses and objections to the taking of his property.

Subdivision (f) allows liberal amendments by the plaintiff, as many times as desired before trial of the issue of compensation and (i) provides the conditions under which plaintiff may dismiss the action.

The obvious purpose of this Rule is to condemn in a single proceeding all properties which are to be used in the proposed government project.

In commenting on Subdivision (b) the 1948 report of the Advisory Committee to the Supreme Court said:

"COMMITTEE NOTE OF 1948

"Note to Subdivision (b). This subdivision provides for broad joinder in accordance with the tenor of other rules such as Rule 18. To require separate condemnation proceedings for each piece of property separately owned would be unduly burdensome and would serve no useful purpose. And a restriction that only properties may be joined which are to be acquired for the same public use would also cause difficulty.

For example, a unified project to widen a street, construct a bridge across a navigable river, and for the construction of approaches to the level of the bridge on both sides of the river might involve acquiring property for different public uses. Yet it is eminently desirable that the plaintiff may in one proceeding condemn all the property interests and rights necessary to carry out this project. Rule 21 which allows the court to sever and proceed separately with any claim against a party, and Rule 42 (b) giving the court broad discretion to order separate trials give adequate protection to all defendants in condemnation proceedings."

Moore's Federal Rules and Official Forms (1951) Pg. 344.

The same thought is expressed by *Barron and Holtzoff* where these writers say:

"Numerous amendments to the complaint, without burdening the court with applications for leave, are permitted because of the number of persons who may be interested in the property and the likelihood that new parties will have to be added and new issues stated, perhaps many times."

1944 *Pocket Part 3, Barron & Holtzoff Federal Procedure and Practice* Section 1952.

The same writers in discussing the dismissal of a Declaration of Taking proceedings state:

"Thus, if plaintiff has filed a declaration of taking under the statutes discussed in section 1526, the action cannot be dismissed without defendant's consent, but the court must award just compensation for the possession, title or lesser interest taken. The purpose of this provision is to avoid circuity of action which would result if the action were dismissed and the defendant remitted to another court, such as the Court of Claims, to recover just compensation for the property right which plaintiff had taken."

3 *Barron & Holtzoff (Pocket Part)* Pg. 120.

The Advisory Committee to the Supreme Court also stated in their Report that:

"Rule 71-a is not intended to and does not supersede the Act of February 26, 1931, 40 U.S.C.A. Secs. 258a-258e, which

is a supplementary condemnation statute, permissive in its nature and designed to permit the prompt acquisition of title by the United States, pending the condemnation proceeding, upon a deposit in Court."

3 *Barron & Holtzoff (Pocket Part)* Pg. 211.

This proceeding having been initiated under the above referred to Declaration of Taking Statute, makes it appropriate to briefly examine this law.

The Act provides:

"In any proceeding . . . for the acquisition of any land or easement or right of way in land, . . . the petitioner may file . . . a declaration of taking . . . 'showing' the estate or interest . . . taken."

"Upon the filing of said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto . . . title to said lands . . . shall vest in the United States of America . . . and the right to just compensation for the same shall vest in the persons entitled thereto; *and said compensation shall be ascertained and awarded in said proceedings and established by judgment therein* . . . The Court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance and other charges, if any, as shall be just and equitable."

Here again there appears a clear intent that a taking shall be a single proceeding with all interests necessary to complete a project described and the compensation ascertained and awarded in the proceeding and established by a judgment in such proceeding.

Referring to Title 50 U.S.C.A. Sec. 171, 171a wherein provision is made for acquisition of lands for military purposes, authorization is given for,

". . . condemnation of any land, temporary use thereof or other interest therein, or right pertaining thereto, needed for . . . (military purposes) . . . such proceedings to be prosecuted in accordance with the laws relating to suits for condemnation of property . . .".

In Title 10 U.S.C.A. 1343a provision is made for acquisition of land by the Secretary of the Air Force, who may

"... purchase the same by agreement or through condemnation."

Even a brief examination of all of these Acts, including the Declaration of Taking Act when read in conjunction with Rule 71A, leads to the conclusion as expressed by *Barron and Holtzoff* that the purpose is to avoid circuitry of action. Also to use the condemnation law for the purpose for which it was intended, that is to compensate all owners of property which is taken in the condemnation proceeding in that proceeding.

These acts all refer to taking property by condemnation. Not to taking it by appropriation, where the owner is forced to seek relief through the *Tucker Act* or in the Court of Claims. If a department is authorized to "condemn" property that is the measure of its authority which may not be extended to acquisition in any other manner.

The Declaration of Taking Act and Rule 71A provide for a description of the property "taken". Certainly this may not be construed to mean only the property which the plaintiff wishes to describe as taken when in truth and in fact other property of other owners is taken.

If this construction is to be placed on those statutes their whole purpose and meaning will be changed with the result that innocent property owners will be forced to embark upon litigation which may have to be settled in Washington.

It would also seem incredible that the United States would seek to compel the filing of 35 actions against it which would require all of the attendant pleadings, preparation for trial and trial thereof, when it is possible to dispose of all these claims in a proceeding now pending before the District Court.

The expressed purpose of Rule 71A is to describe all interests to be condemned, to add as defendants all persons *having* or *claiming* an interest in the property whose names can be learned

by search or otherwise, and these must be served and allowed to answer. All individual owners are entitled to appear and be heard. *Gwathmey vs. United States*, 215 F. 2d 148, (C.C.A. 5)

Those who seek to take or deprive owners of their property for public purposes must follow scrupulously the law which permits such action. *General Box Co. vs. United States*, 107 Fed. Supp. 981.

It appears obvious that this procedure was adopted to save time and expense and to avoid a multiplicity of suits. This was recognized in *State of California vs. United States*, 153 F. 2d 558, (C.C.A. 9)

Petitioners and defendants believe that a distinction may be made between those cases where separate estates exist and the condemnor takes only one or more of several of such estates and those cases where the entire fee title is taken and still other cases where the estate taken requires additional estates for its use in the manner contemplated.

A mortgagee, a lien holder or a lease holder is a proper party where the fee title is sought. For the same general reason where in construction of dams, levees or reclamation projects other lands even though not adjacent are necessarily damaged by raising water above the highwater mark, the owners of such lands are proper parties, and are compensated for their loss in the condemnation proceeding.

Other cases indicate that where there is a dispute between two parties over the ownership of some portion of the condemned property or a dispute as to the division of the fund, such are not necessary or proper parties to the action and such dispute should be settled in a separate action.

Where, however, as here, property is taken for a use which use it is known in advance will damage other properties, not by raising the water level above the highwater mark but by flying planes at an extremely low elevation, both the condemned and uncondemned properties are taken simultaneously.

The Supreme Court of the United States in *United States vs. Petty Motor Co.*, in discussing the case of *United States vs. General Motors*, 323 U.S. 373, 89 L. ed. 311, 65 S.Ct. 357, where temporary occupancy was taken of a part of a leased building said:

"Thus the Court applied a rule of compensation to the case of carving out a temporary or short-term use from a longer term very different from that generally applicable when the owner's entire interest is taken. The purpose and basis for this were to give substance, in practical effect to the Amendment's explicit mandate for payment of 'just compensation' in cases of such extraordinary 'takings' and to prevent those words from being whittled down by legalistic construction into means for practical confiscation."

United States vs. Petty Motor Co., 327 U.S. 372, 90 L. ed. 729

Forcing 35 petitioners and 5 defendants to file separate actions to obtain just compensation for damages suffered may not amount to "practical confiscation" but we believe it violates not only the spirit but the letter of the Constitution.

This principle was given recognition by the District Court of Northern California where it was said:

"The power of the court to award compensation for the actual taking, is not limited to what is sought *in this proceeding* to be taken, nor is the City relegated to relief therefor in other forums, e.g., The Court of Claims. *United States vs. General Motors Corp.*, 323 U.S. 373, 89 L. ed. 311, 156, A.L.R. 390 * * *

"In passing it should be noted that the scope of intangible rights compensable in condemnation proceedings, is being steadily broadened in decisions of the Supreme Court. See *United States v. Causby*, 66 S.Ct. 1062." (Emphasis by the Court)

United States vs. 4.105 Acres of Land, 68 Fed. Supp. 279.

In the above consolidated action the United States sought condemnation of two parcels of land of 4.105 and 100 acres respectively for use in sinking wells to obtain water from a subterranean basin thereunder. The City (San Francisco) owned

other lands over the same basin which it had previously acquired when it bought out a water company. The United States contended it had not taken nor did it seek to take any property or property right of the City. In each condemnation action the City appeared and was allowed to make its claim to waters in the basin.

While there are several different classes of petitioners we believe there is little if any distinction between them as to their right to present their claims before the District Court.

Certainly those who were already defendants should have such right and whether their petition was to be treated as one in intervention or as an answer makes but little difference. Whether the petition was subject to a motion to strike any portion thereof also was of little moment.

As to the other petitioners who are not defendants, their right to appear stems from the facts set forth in the Petition for Intervention, which for the purpose of this proceeding must be taken as true. *Clark vs. Sandusky*, 205 F. 2d 915. (C.C.A. 7) Forcing each of them to file a separate action would be as much a violation of orderly procedure as was the fact situation discussed in *California vs. United States*, supra, where the state of California proposed to appear in separate proceedings for damages to its highways in front of each of 270 lots.

The United States below in objection to the Petition for Intervention discussed a number of legal propositions under a general objection wherein it asserted:

The Court is without jurisdiction to give the relief sought because the parties seeking intervention are in effect attempting to make a counterclaim against the United States of America in that they seek a judgment compelling payment of just compensation for property not included in the Declaration of Taking.

Here the United States adopted the position that the petitioners were attempting to assert a counterclaim for damages for property *not included* in the Declaration of Taking, which appellee stated may not be done.

This presents the principal legal issue involved in this action and may be stated as follows:

May the United States by a Declaration of Taking, take certain lands when by reason of such taking and the declared purpose for which such lands will be used, adjoining lands are rendered valueless or less valuable, without permitting the owners of such adjoining lands the right to intervene in the action and make claims for their damage?

Using other language and stating the question more broadly:

May the United States by omitting from a Declaration of Taking, property which in effect is actually taken, successfully eliminate all consideration of that property and thereby force the owner or owners thereof to seek relief in separate actions against the United States?

If there are, as here, a number of separate owners, each would be forced to file his individual action.

We cannot believe that either law or equity compels the adoption of such procedure.

The liability to compensate the owner of property condemned is clear, whether the condemnor is the United States or some other party having the right of Eminent Domain.

"Generally compensation must be made for all kinds of property, and every kind of right or interest in property which has a market value."

29 *CJS Eminent Domain* Sec. 104 Pg. 907.

A "taking" of property may consist of an interference with the right to the use and enjoyment thereof. 29 *CJS Eminent Domain*, Sec. 110, pg. 917; *In re Forsstrom*, 38 P. 2d 878, 44 Ariz. 472; see cases cited *supra* re "*Aircraft Takings*."

If the foregoing is true, that is, if property rights generally must be paid for, and if interference with the use and enjoyment of property constitutes a "taking" and that continuous low flying aircraft constitute an interference with the use and enjoyment of one's property, then owners of such rights are proper parties to

this action. We also believe Adaman's right to compensation is equally clear.

We agree with the general principle that counterclaims may not be filed against the government but also believe this principle is not applicable to the case at bar.

The Circuit Court of Appeals for the Tenth Circuit had a somewhat similar situation wherein lands were condemned in 1943 by the government for a term from year to year during the emergency and for three years thereafter at the election of the United States. In 1950 the owner filed a petition for Removal of Structures and Restoration of Possession, seeking among other things, if the government was to continue in possession, an order fixing a fair present compensation to the owner. The Circuit Court in part said:

"Appellee undertakes to support the Court's conclusion upon the broad principle that the United States cannot be sued without its consent. As applicable here this contention is fallacious. Appellant has not sued the United States. It has only sought to have its rights determined in and under the statutory proceeding brought by the Government. When the Government came into court it stood in the same position as any other suitor. See *Mountain Copper Co. v. United States*, 9 Cir., 142 F. 625, 629; *B. C. Shevlin Co. v. United States*, 9 Cir., 146 F. 2d, 613, 615." *Stroh Brewery Co. v. United States* 196 F. 2d 899, Page 900, Par. 9.

This Court has held that a lienholder of street improvement bonds, while not a necessary party is a proper party to a condemnation proceeding and must be protected in some practical manner. Such a claim would certainly not be a counterclaim. *Thibodo v. United States* 187 F. 2d 249.

Even a casual reading of the cases discussing this subject shows that as to condemnation actions there has been some confusion because of different fact situations. Appellee in the court below cited such cases as *Oyster Shell Products v. United States* where the Circuit Court of the Fifth Circuit held that a pleading denominated

as a "counterclaim" was properly stricken by the District Court, where it sought compensation for lands "taken" which were not included in the Declaration of Taking for flood control purposes, on the ground that such constituted an action against the United States where it had not consented to the suit.

However, the District Court refused to strike from the answer the allegations contained therein referring to land not described in the Declaration of Taking. Contrary to the assumption of appellee both the District and Circuit Courts here held that damages to contiguous land may be recovered in the condemnation proceeding. The syllabus in 100 Fed. Supp. 378 correctly states the conclusion of both Courts where it says:

"In proceeding by the United States to condemn land for floodway purposes, owner, in addition to compensation for the land taken, may recover for damages to contiguous land caused by the use to which the land taken has been put."

The Fifth Circuit again two years later had before it an action wherein the United States condemned 111.44 acres of filled and submerged lands and where again an owner of condemned and uncondemned lands sought compensation for diminishment in market value of the untaken lands, the Court held that the untaken lands lost certain riparian rights for which the owner should be compensated in the condemnation action. *United States v. 11.48 Acres of Land* 212 F. 2d 853.

In this case the Court found that:

"It affirmatively appears that this diminution in value of the uplands does not result from a taking of the uplands, but that the right, if any, to be compensated for such diminution of value arises, 'by reason of the taking of the riparian rights appurtenant thereto,' which as we have shown are rights in the submerged lands taken. . . . For such taking the Fifth Amendment guaranteed to the appellee the right to just compensation."

Appellee also cited *State Road Dept. of Fla. v. U.S.* 166 F. 2d 843, wherein the Fifth Circuit Court, held that the State Road Dept. of Florida could not obtain compensation for damage to a

portion of a highway alleged to have been taken and exclusively used by the United States; however, in this case the petition excluded "all rights of way, deeded or acquired for public roads thru this tract."

We wish to refer to some of the cases wherein this question has been either directly or inferentially passed upon by various courts.

The owners of lots which carried easements in a sewer system were allowed to intervene. *United States v. Certain Parcels of Land* 89 Fed. Supp. 567 and 571; 196 F. 2d 657.

The United States condemned the fee title to certain land on which the claimant possessed the right to cut timber. The Fifth Circuit Court allowed the claimant to intervene and held the compensation to the landowner did not include compensation to the timber owner and compensation to him was allowed. *J. Herbert Bate Co. v. Pine Land Co.* 132 F. 2d 925.

Where the court vested title in fee in the United States subject only to highway easements, Cemetery Company's easement for drainage sewer lines across condemned land, gave it the right to appear and claim compensation. *United States v. Sunset Cemetery Co.* 132 F. 2d 163. (C.C.A. 7)

Where the United States sought condemnation of .8677 of an acre of City property for a recreation center, adjoining property owners could intervene "as persons injured in kind different from others. Citing cases." *United States v. .8677 Acre of Land*, 42 Fed. Supp. 91.

Where property owners each acquired an easement with their purchase of their lots in a restricted park over certain streets with the obligation of each to pay his proportion of the maintenance costs of the park, they were allowed to intervene when 42% of the park was condemned by the United States and compensation was proper for the streets taken and also for loss of revenue for maintenance of the park by reason of 42% being taken. *United States v. Certain Lands* 49 Fed. Supp. 265.

Where lands in a drainage district were taken by condemnation, government was liable for assessments for construction and maintenance and district was a proper party. *United States v. Aho* 68 Fed. Supp. 358. Substantially the same facts and decision appear in *United States v. Florea*, 68 Fed. Supp. 367. Also see *United States v. Aho* 51 Fed. Supp. 137.

Where an access road was condemned but no part of the land owner's land was taken, he nevertheless was entitled to compensation for his loss of access in the condemnation action. *Schiefelbein v. United States*, 124 F. 2d 945. (C.C.A. 8)

Where the United States sought the return of an airplane given to a public school which was later sold to a private party, the court compared the action of the plaintiff (the United States) to an action in Eminent Domain, allowed the counterclaim of the new owner and allowed a judgment against the government. *United States v. Finn*, 127 Fed. Supp. 158.

In effect the appellee argued that certain specified lands have been taken and any damage to any other lands may not be compensated for in this proceeding. The petitioners submit that the expressed purpose for which the condemned lands were taken shows on its face that adjacent lands were to be damaged and were in effect also taken by the condemnation.

Appellants point out that if lands are taken for a use which in itself requires the exercise of an easement over adjacent lands, such easement is not a new or different "taking" any more than is the "taking" of a "flowage easement" as applied to the owners of lands riparian to a river, where compensation for such takings is made in the condemnation proceedings. *United States v. 2979.72 Acres of Land* 218 F. 2d 524 (C.C.A. 4). *United States v. Wabasha-Nelson Bridge Co.* 83 F. 2d 852. (C.C.A. 7) *United States v. Chicago B&QR Co.* 90 F. 2d 161. (C.C.A. 7) See also *United States v. Dickinson* 91 L. ed. 1789.

That flights of jet planes across and over the lands of petitioners constitute a "taking" is established. *United States v. Causby*,

90 L. ed. 1206. And that the United States has recognized this liability by condemning easements for this purpose is also apparent. *United States v. 26.07 Acres of Land* 126 Fed. Supp. 374; *United States v. Theimer* 199 F. 2d 501.

We believe the facts in the case at bar are analogous to *United States v. 11.48 Acres of land* 212 F. 2d 853 (supra) where land not described in the petition was considered in the condemnation and compensation for riparian rights attached to such untaken land was allowed. Even the stated purpose of the condemnation was considered by the court as bearing on the owner's damage. Here the rights of defendants and other interveners are just as completely taken as though runways had been constructed thereon. *United States v. Causby*, supra.

In *Boyd v. United States*, supra, the Circuit Court for the Eighth Circuit discussed the general rules relating to the right to compensation not only for the market value of the land taken but for damage to the remainder, due to the use to which the part appropriated is to be devoted. This case involves condemnation of land for an airfield and while the court denied the right of recovery to the claimant for depreciation in value of his remaining land, the principle is recognized and we believe is clearly applicable, at least to defendant Goodyear Farms, the original owner of 212.63 acres of the 239 acres taken under the Declaration of Taking. For the same reason it would appear that this principle would equally apply to defendant Adaman Mutual Water Company.

The right to compensation for taking lands adjacent to water development projects is fully discussed in *United States v. Twin City Power Co.* 215 F. 2d 592 (C.C.A. 4)

We have here a number of property owners, part of whom are already defendants, claiming that they have had valuable property rights taken by reason of this condemnation. They allege, not that they will suffer incidental or consequential damage, but that they have suffered a direct taking of valuable property rights for which they seek compensation in this proceeding.

We believe the language of the Circuit Court of the First Circuit is most appropriate.

"Upon condemnation the condemnor is vested with a complete title and all interests in the property taken are extinguished. *A. W. Duckett & Co. Inc. v. United States*, 1924, 266 U.S. 149, 45 S. Ct. 88, 69 L. Ed. 216; *United States v. Dunnington*, 1892, 146 U.S. 338, 13 S.Ct. 79, 36 L. Ed. 996. All persons having any interest in the property taken are necessary parties to the condemnation proceedings. See 2 Lewis, *Eminent Domain*, 3rd Ed. 1909, 1909, Sec. 515, p. 935. . . . The right to compensation carries with it the right to be heard upon the important question of the value of the property taken and the damages caused. *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 284, 285, 45 S.Ct. 491, 69 L. Ed. 953; *Bragg v. Weaver*, 251 U.S. 57, 59, 40 S. Ct. 62, 64 L. Ed. 135; *Londoner v. City & County of Denver* 210 U.S. 373, 378, 28 S.Ct. 708, 52 L. Ed. 1103." *Silberman v. United States* 131 F. 2d 715 (supra) Page 717.

There can be but little doubt that these appellants had an interest in the property taken and if this be true certainly they had an interest in the value of that property, and the damage caused. *Hopkins v. McClure* 148 F. 2d 67 (C.C.A. 10) *United States v. Adamant Co.* 197 F. 2d 1 (C.C.A. 9)

The determination as to whether a petitioner is permitted to become a party to a condemnation proceeding appears to be largely a matter within the sound discretion of the court and is to a great extent governed by the facts in the individual case.

This general principle has been well stated by the Circuit Court of Appeals for the Fourth Circuit where that Court said:

"Nothing seems better settled than that an application of an intervener seeking to be admitted as a party to a pending cause is addressed to the sound discretion of the Court,"

Board of Drainage Comrs. v. Lafayette Bank 27 F. 2d 286, 293.

The District Court in 102 Fed. Supp. 691 (supra) said:

"As a matter of justice and thorough administration of the law, where all the persons interested have not been made parties to the proceeding, the court may allow them to intervene or be made parties. *United States ex rel. and for Use of Tennessee Valley Authority v. Powelson et al.*, Cir., 118 F. 2d 79; 29 C.J.S., Eminent Domain, Sec. 237."

This Court said in *United States v. Adamant Co.*:

"It is an elementary principle in the law of condemnation, whether exercised by the government of the United States or by state or public bodies, that all persons having any interest in the property be made parties defendant. Nichols on Eminent Domain 3rd ed. 1950, Vol. 2, Secs. 5.1 - 5.3; 29 C.J.S., Eminent Domain, Sec. 236; *United States v. Dunnington* 1892, 146 U.S. 338, 13 S.Ct. 79, 36 L.Ed. 996; *Minnesota v. United States*, 1939, 305 U.S. 382, 59 S.Ct. 292, 83 L.Ed. 235; *United States v. Sunset Cemetery Co.*, 1942, 7 Cir., 132 F. 2d 163, 164; *State of Nebraska v. United States* 1947, 8 Cir., 164 F. 2d 866, 868; California Code of Civil Procedure, Secs. 387, 389, 1246."

United States v. Adamant Co. 197 F. 2d 1, Cert. denied 97 L. Ed. 698.

In its memorandum the United States pointed out that Congress and not the courts declares what lands or interest in lands are necessary for public use and that when this power is delegated to an administrative officer, his determination is not subject to judicial review.

We have no quarrel with these principles and find no conflict in their application to the obligation of the United States to comply with the Fifth Amendment in this proceeding. *United States v. 1278.83 Acres in Mecklenburg County*, 12 F.R.D. 320.

Appellee further argued that the condemnation statutes do not authorize the adjudication of claims not arising out of the taking which the owner may have against the Government.

We have heretofore shown that there is a distinction between those claims which arise out of the taking and those which do not,

and have, we believe, shown conclusively that the claims of these interveners all arise out of the taking before the District Court.

That the United States may not be sued without its consent is elementary, but when the United States seeks to take private property under its power of eminent domain its obligation to make "just compensation" is no different from that of any other condemnor.

The assertion was made by appellee below that just compensation cannot be increased by the amount of tax liens nor can land be taken subject to such liens. This is the general rule and applies to tax liens. Assessments levied by private associations such as Park districts and Drainage districts where the obligation goes with the land, are not taxes, but in the nature of special assessments for local improvements and when lands subject to these assessments are taken by the federal government, it is not exempt from the payment thereof. Under the Declaration of Taking Act the court has power to make such orders with respect to "encumbrances . . . assessments . . . and other charges, if any, as shall be just and equitable." (Title 40 Sec. 258a USCA). *United States v. Aho*, 68 Fed. Supp. 358; *United States v. Florea*, 68 Fed. Supp. 367; *United States v. Certain Parcels in Fairfax County*, 89 Fed. Supp. 567 and 571; 196 F. 2d 657. Also see *United States v. Aho* 51 Fed. Supp 137.

The government may exercise its power of Eminent Domain on such terms and in such manner as it wishes, without interference from the Court, but it is the court's duty to see that owners receive, so far as is possible, just compensation for property taken from them. *United States v. 9.94 Acres of Land in Charleston* 51 Fed. Supp. 478. No construction of Rule 74(a) or any other rule or statute can take from a property owner the protection guaranteed to him by the Fifth Amendment.

It is not the duty of the plaintiff where the United States takes possession under a Declaration of Taking and pays into court the estimated value of the property taken to concern itself with the

distribution of that fund. That is the province of the Court. *United States v. 19,573.59 Acres of Land in Cheyenne County*, 70 Fed. Supp. 610, affd. 164 F. 2d 866, Cert. denied 334 U.S. 815, 92 L. Ed. 1745; *United States v. EC $\frac{1}{4}$ Acres of Land in Brooklyn*, 176 F. 2d 255; *United States v. Adamant Co.* (supra).

Appellee in objecting to the filing of the Petition for Intervention submitted the following proposition:

Rule 71A of the Federal Rules of Civil Procedure for the United States District Courts establishing procedure in condemnation of property in section (E) thereof precludes any pleading other than complaint and answer thereto.

Appellee here referred to paragraph (c) of Rule 71A which provides for a complaint, paragraph (e) which provides for an answer and concludes with the provision "no other pleading or motion asserting any additional defenses or objections shall be allowed."

This language was submitted by the United States as prohibiting the filing by petitioners of any pleading other than an answer which would be limited to those matters provided for in Rule 71A.

The inference is apparent that only a defendant may appear and he is limited by the rule to an answer and nothing more. No other pleading may be filed and therefore petitioners who are not defendants may not file any pleading.

This of course leads to the illogical conclusion that the United States may by simply refusing to name a property owner as a party defendant prevent him from appearing in the action. Clearly the Rule applies only to named defendants and not to those seeking intervention, and does not control other pleadings under other rules.

The Advisory Committee to the Supreme Court in referring to Subdivision (e) had this to say in their 1948 Report:

"COMMITTEE NOTE OF 1948.

"Note to Subdivision (e) Departing from the scheme of Rule 12, subdivision (e) requires all defenses and objections to be presented in an answer and does not authorize a preliminary motion. There is little need for the latter in condemnation proceedings. The general standard of pleading is governed by other rules, particularly Rule 8, and this subdivision (e) merely prescribes what matters the answer should set forth. Merely by appearing in the action a defendant can receive notice of all proceedings affecting him. And without the necessity of answering a defendant may present evidence as to the amount of compensation due him, and he may share in the distribution of the award. See also subdivision (d)(2); Form 28."
Moore's Federal Rules 1951, Page 349.

We wish to point to another provision of Rule 71A which provides that before any hearing involving compensation

"The plaintiff *shall* add as defendants all persons having or claiming an interest in that property whose names can be ascertained by a reasonably diligent search of the records....., and also those whose names have otherwise been learned."

It would appear that when the plaintiff becomes aware of the names of persons claiming compensation it is the duty of the plaintiff to join them. It would seem that the question as to whether such claimants possessed a just claim for compensation, should be determined by the Court rather than by plaintiff.

However, if the plaintiff refuses to name as a defendant one who has a right to claim compensation for property taken, such claimant not being a defendant could not be bound by a limitation designed to apply to those defendants named and should have the right to file such appropriate pleading as would permit a determination of the validity of his claim, under the general rules of pleading in Federal Courts.

Appellee also questioned petitioners' allegations as to the availability of other remedies and asserts:

Allegation that intervention is the only procedure by and under which relief can be had is without merit.

Here appellee offered interveners the questionable substitute for intervention by pointing out that the Tucker Act furnishes protection for "aircraft takings."

This may generally be true and the Tucker Act may furnish an alternative method to petitioners; however, we believe that at least as to those petitioners who are defendants, unless their claims are pressed in this proceeding they may be barred from thereafter seeking compensation for any such claims.

This argument was presented by the United States in *United States v. Chicago B&QR Co.* 90 F. 2d 161, *supra* and was approved by the court where it said:

" . . . that unless appellee presented all of its claims for proximate damages to its remaining property at the time of the physical appropriation of the land it would be barred thereafter from recovering those omitted." (Page 167).

It is recognized that the mere fact that there is another remedy available to interveners is no bar to intervention and that intervention is allowed to prevent a multiplicity of suits. *Clark v. Sandusky* 205 F. 2d 916. (C.C.A. 7.)

We wish finally to call attention to the principle of *res judicata* which might well be urged by the appellee in any subsequent action regarding compensation to these interveners and defendants.

It has been stated that:

"The principle of *res judicata* will prevent subsequent litigation on questions of property interest which should have been raised in the condemnation at least so far as notice is concerned, constructive notice is sufficient, . . ." *United States v. Winn* 83 Fed. Supp. 172.

It has also been held that an award of compensation under a state statute, is conclusive as to every matter which could have been included therein whether or not it was in fact included. *South Carolina Public Service Authority v. 11,754.8 Acres of Land* 123 F. 2d 738. (C.C.A. 4.) See *United States v. 16,572 Acres of Land* 49 Fed. Supp. 555.

In conclusion petitioners submit to the sound discretion of the court their right to present in this proceeding their claims for compensation for property and property rights which have been taken from them by this condemnation.

Neither Rules nor Statutes can deprive a property owner of just compensation when the government exercises its right of eminent domain and takes his property from him.

Here no denial is made that petitioners have suffered damage, in fact this is probably admitted, but says the United States these claimants should seek relief in separate actions, before separate juries and at some other time.

The stated purpose of Rule 71A was to eliminate uncertainty, waste of time, needless expense and to protect defendants. The allowance of a broad joinder of properties was to eliminate separate actions for each piece of property which had previously been unduly burdensome and served no useful purpose.

Surely 35 separate trials before 35 separate juries would serve no useful purpose and certainly it would be burdensome on the court as well as on both the United States and the claimants.

Respectfully submitted,

SNELL & WILMER

By Mark Wilmer

In the United States Court of Appeals
for the Ninth Circuit

GOODYEAR FARMS, A CORPORATION; ADAMAN MUTUAL
WATER COMPANY, A CORPORATION; B. W. MULLINS,
JAMES H. SHARP, GEORGE W. BUSEY, CARLON H.
HINTON AND VERA HINTON, HIS WIFE, ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

GOODYEAR FARMS, A CORPORATION; ADAMAN MUTUAL
WATER COMPANY, A CORPORATION; BILL W. MUL-
LINS AND RALPH ASHBY AND GRACE ASHBY, HUSBAND
AND WIFE, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES

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FILE

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15113

GOODYEAR FARMS, A CORPORATION; ADAMAN MUTUAL
WATER COMPANY, A CORPORATION; B. W. MULLINS,
JAMES H. SHARP, GEORGE W. BUSEY, CARLON H.
HINTON AND VERA HINTON, HIS WIFE, ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

GOODYEAR FARMS, A CORPORATION; ADAMAN MUTUAL
WATER COMPANY, A CORPORATION; BILL W. MUL-
LINS AND RALPH ASHBY AND GRACE ASHBY, HUSBAND
AND WIFE, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF ARIZONA*

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court did not write an opinion.

JURISDICTION

The jurisdiction of the district court was invoked
under the Act of February 26, 1931, 46 Stat. 1421, 40

U. S. C. sec. 258a, and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. sec. 257; the Act of August 18, 1890, 26 Stat. 315, 316, as amended by the Acts approved July 2, 1917, 40 Stat. 241, and April 11, 1918, 40 Stat. 518, 50 U. S. C. sec. 171, which acts authorize the acquisition of land for military purposes; the Act of August 12, 1935, 49 Stat. 610, 611; 10 U. S. C. sec. 1343a, b and c, which Act authorized the acquisition of land for Air Force Stations and Depots; the National Security Act of 1947, 61 Stat. 495; the Act of July 14, 1952, 66 Stat. 606; which Act authorized acquisition of the land, and the Act of July 15, 1952, 66 Stat. 637, which Act appropriated funds for such purposes.

The order denying the motion for intervention was entered December 29, 1955, and notice of appeal therefrom was filed January 26, 1956 (R. 185). The order denying leave to file amended notice of appearance was filed March 5, 1956, and notice of appeal therefrom was filed March 28, 1956 (R. 222). The two appeals were consolidated. The jurisdiction of this Court rests upon 28 U. S. C. sec. 1291.

QUESTIONS PRESENTED

1. Whether a court in a condemnation suit has jurisdiction to award compensation for the alleged taking of an avigation easement not described in the complaint.

2. Whether an irrigation water company may make a claim, in addition to the just compensation for the

unencumbered fee, for its right to make future assessments on condemned land.

3. Whether an irrigation water company has a compensable interest in land condemned by the United States for possible future assessments for the cost of the company's operation, maintenance, repair or improvement.

STATEMENT

This is a condemnation proceeding to condemn the fee simple title to approximately 239 acres (later enlarged to 253 acres) of land in Maricopa County, Arizona. The land was taken for the purpose of extending and improving the runways and facilities of Luke Air Force Base at Litchfield Park, Arizona. 233 acres of the land taken were within the Adaman Reclamation Project which before the taking contained approximately 2,831 acres. The Adaman Mutual Water Company (hereafter referred to as "Water Company"), an Arizona nonprofit corporation but not "a common carrier or public service corporation," is owned and operated by the landowners in the project to provide water for irrigating the land (R. 89-91).

The Water Company had the right while land in the Adaman Reclamation Project remained in private ownership to make pro rata assessments against that land for the operation, repair, improvement, or extension of the works owned by the Water Company. Such assessments and the subscription price of the Company stock (one share per acre) were to become due as made or called by the Board of Directors, and

amounts which thus became due were to be liens on the shares and the land.

The condemned land was divided into 10 tracts, numbered 111 to 120, inclusive, of which tracts 113 to 120, inclusive, were in the Adaman Reclamation Project. Full fee simple title to all tracts was vested in the United States upon filing of a declaration of taking and entry of judgment thereon on June 15, 1954. Subsequently the district court entered judgment fixing the just compensation for each tract except 119. During the course of the condemnation, it was determined that Well Site 18-C which was tract 119 (R. 13) was in fact part of tract 116 (R. 174, 175) thus making a separate judgment for tract 119 unnecessary. All the judgments were based upon stipulations with the owners. The stipulations for tracts 113 and 117 to 120, inclusive, contained provisions that the compensation was to be paid without prejudice to rights arising out of the petition for intervention (R. 140, 151, 161, 169). The stipulations provided for payment to Adaman Mutual Water Company of any assessments due on the tract and the subscription price on stock pertaining to the tract which was unpaid.

On July 24, 1954, a motion was made to intervene in the condemnation proceeding. The motion was made by the Adaman Mutual Water Company for itself and its stockholders asking compensation for its right to collect from the condemned lands the pro rata share of its future operating costs. The motion contained a distinct claim by various individuals as landowners, contract purchasers and lessees asking compensation for the

alleged use of an avigation easement over their land adjoining the airfield. Adaman Mutual Water Company and Goodyear Farms as owners and B. W. Mullins as a lessee were defendants in the condemnation proceeding as well as petitioners to intervene. B. W. Mullins was the lessee and Goodyear Farms the owner of tract 118 in the condemnation proceeding. It was a part of the tract which appellants designated as No. 19 on the map attached to their petition for intervention (R. 74). Appellants' Tract 19 is the only tract over which an avigation easement is claimed to have been taken which also included land (Tract 118) specified in the condemnation proceeding. The United States has never sought to condemn any interest in the lands over which the avigation easement is alleged to have been taken. The motion to intervene was denied by the district court on December 29, 1955. On February 20, 1956, the defendants Goodyear Farms, Adaman Mutual Water Company, B. W. Mullins and Ralph and Grace Ashby, petitioned the district court for leave to file an amended appearance in the condemnation proceeding. The grounds alleged in support of the petition were substantially the same as those alleged in the petition to intervene which the court had earlier denied. The petition for leave to file amended notice of appearance was denied by the court on March 5, 1956.

SUMMARY OF ARGUMENT

Both the appeals present the same two questions of law. If there can be no recovery in this condemnation proceeding for the use of an avigation easement

over land which is not condemned and if the Water Company has no claim in addition to the just compensation for the unencumbered fee of the lands in the Adaman Reclamation Project which were condemned, then the various petitioners have no grounds on which either to intervene or to file an amended appearance. The argument for each question will be presented separately.

1. *The avigation easement damages cannot be claimed in this condemnation proceeding.*—The district court had no jurisdiction to consider any claims relating to property not described in the complaint in condemnation. To consider such an extraneous matter would be to entertain a claim against the United States in a manner and in a court in which the United States has not consented to be sued. If the United States has used an avigation easement over lands owned by appellants they have a remedy under the Tucker Act. The appellants cannot pursue such remedies in this proceeding. The statutes under which this condemnation proceeding was brought do not authorize the petitioners to pursue remedies they may have under other statutes.

2. *The value of future assessments cannot be awarded in addition to the fee value.*—The United States is entitled to have just compensation for condemned property determined as an undivided whole and without reference to the various interests. The determination of just compensation has been made by the nine judgments of the district court from which no appeal was taken by the Water Company. The

principle of *res judicata* prevents the Water Company from raising any question which might have been raised in connection with the determination of just compensation. When the United States has paid the just compensation into court it has performed its full duty. The Water Company has no further recourse against the United States.

3. *In any event future assessments are not a compensable interest in property.*—Appellants assert the future assessments were a lien upon and a covenant running with the condemned land. Future assessments are not a lien upon land unless the statute or other authority creating the assessment right contemplated that future assessments should constitute a lien. An examination of the pertinent documents reveals there was no intent to make future assessments a lien.

There are no cases with a direct holding that covenants running with the land are compensable interests in condemnation proceedings. The Water Company's claim is really a claim for frustration of, at best, contract rights rather than an appropriation of an interest in land.

ARGUMENT

I

The avigation easement damages cannot be claimed in this condemnation proceeding

The appellants contend that lands belonging to them which are outside the airfield, and have never been condemned by the Government, have nevertheless

been “taken” by the Government by reason of the flight of aircraft in taking off and landing at the airfield at such a low level as to constitute an interference with their use of the land. For present purposes, the Government takes no position on the merits of this claim. The sole contention of the Government is that if there has been such a “taking” the proper remedy of the appellants is a suit under the Tucker Act in the Court of Claims, 28 U. S. C. sec. 1491, or if the amount is under \$10,000 in the United States District Court, 28 U. S. C. sec. 1346 (a).¹

The district court had no jurisdiction in this condemnation case to consider claims as to parcels of land not embraced within the condemnation complaint. *Minnesota v. United States*, 305 U. S. 382 (1939); *United States v. 2,648.31 Acres of Land, Etc.*, 218 F. 2d 518 (C. A. 4, 1955); *Oyster Shell Products Corp. Inc. v. United States*, 197 F. 2d 1022 (C. A. 5, 1952), certiorari denied, 344 U. S. 885, affirming *United States v. 9 Acres of Land*, 100 F. Supp. 378 (E. D. La., 1951); *United States v. 534.7 Acres of Land*, 157 F. 2d 828 (C. A. 5, 1946); *New York Telephone Co. v. United States*, 136 F. 2d 87 (C. A. 2, 1943); *Moody v. Wickard*, 136 F. 2d 801 (C. A. D. C., 1943), certiorari denied, 320 U. S. 775 (1943); *Karlson v. United States*, 82 F. 2d 330, 335–336 (C. A. 8, 1936). The identical contention which the appellants are making in this appeal was made by the appellant in

¹ There is, in fact, now pending in the Court of Claims a suit by appellants on this claim. *Adaman Mutual Water Co. et al. v. United States*, No. 139–56, filed March 28, 1956.

the *Oyster Shell* case. The Court there said (p. 1023):

* * * The appellant's counterclaim insists that there should have been included in the petition for condemnation filed by the United States a description of all of the property belonging to appellant and described in its counterclaim, included and embraced in the actual taking in the construction of the Floodway; that practically all of appellant's properties have been dammed into the channel of the Floodway. The district court held that it had no jurisdiction to consider the counterclaim, because it sets up a claim against the United States in a manner and in a court in which the United States has not consented to be sued. We are in agreement with the views of the district court and do not consider it necessary to expand upon its opinion.

Settled principles compel this result. The United States cannot be sued without its consent. When it institutes a proceeding as plaintiff it does not consent to the assertion by way of counterclaim or otherwise of matters other than that which it submitted to the court. *United States v. Shaw*, 309 U. S. 495 (1940); *United States v. United States Fidelity and Guaranty Co.*, 309 U. S. 506 (1940); *United States v. Sherwood*, 312 U. S. 584 (1941). The condemnation complaint did not generally submit to the court all questions as to this particular project. It vested the court with jurisdiction only to award compensation for the taking of the specific parcels designated. Thus it is normal practice particularly in large projects to acquire

most of the lands by direct purchase, and to bring a series of proceedings to condemn various parcels for a particular project as they may be needed. Cf. *United States v. Miller*, 317 U. S. 369 (1943). Acceptance of appellants' present contention would produce the absurd result that in such cases the institution of the first condemnation proceeding would vest the court with jurisdiction to adjudicate the alleged taking of any lands for use with that project however remote physically. No such blanket consent to suit can be implied simply from institution of a proceeding to condemn designated lands.

Even though flights over private land may, in some circumstances, constitute a taking for which compensation may be had under the Tucker Act (*United States v. Causby*, 328 U. S. 256 (1946)), appellants cannot pursue such remedies in this proceeding. The statutes under which this condemnation proceeding was brought do not authorize the appellants to pursue causes of action against the United States they may have under other statutes. *United States v. Shingle*, 91 F. 2d 85 (C. A. 9, 1937); *United States v. John Ii Estate*, 91 F. 2d 93 (C. A. 9, 1937), certiorari denied in both cases, 302 U. S. 746 (1937).

The authorities cited by appellants do not sustain the proposition that a condemnee may inject into the case an issue of the alleged taking of lands not described in the complaint. They represent simply application of two principles of valuation. The first is the so-called "severance damage" rule requiring that in valuation regard be had to the fact that the parcel taken is part of a larger unit. Cf. *United States v.*

Wabasha-Nelson Bridge Co., 83 F. 2d 852 (C. A. 7, 1936); *United States v. Chicago, B. & Q. R. Co.*, 90 F. 2d 161 (C. A. 7, 1937). The second is the principle that easements or access roads and similar interests in land cannot be valued without reference to the property which they serve and the diminution in value which may be caused thereto by destruction of the easement.

Thus *United States v. 11.48 Acres of Land*, 212 F. 2d 853 (C. A. 5, 1954), did not hold, as appellants claim (Br. 24), that damages to contiguous uncondemned lands could be recovered in the condemnation proceeding. The decision shows that compensation was paid not for the uplands, which were not in the condemnation proceeding, but for the riparian rights which were appurtenant to the uplands. The court expressly stated (p. 854) "The riparian rights of appellee, while accruing from his ownership of uplands, were easements or rights in the river and in the submerged lands condemned in this proceeding." Indeed, the language upon which appellant relies (Br. 24) says "this diminution in value of the uplands does not result from a taking of the uplands. * * *." The number of cases cited by appellants in which the owners of easements in condemned land were allowed to intervene or receive just compensation in condemnation proceedings are irrelevant for these reasons. *United States v. Sunset Cemetery Co.*, 132 F. 2d 163 (C. A. 7, 1942); *United States v. Certain Lands at Great Neck*, 49 F. Supp. 265 (E. D. N. Y., 1943); *Schiefelbein v. United States*, 124 F. 2d 945 (C. A. 8, 1942); *United States v. 11.06 Acres of Land*, 89 F.

Supp. 852 (E. D. Mo., 1950). The appellee does not doubt the right of the owner of an easement in the land described in the complaint to just compensation, but the appellants' claims are not for any easements in the condemned property. Likewise it is perfectly clear that both the Declaration of Taking Act and Rule 71A contemplate that the specific lands to be considered are to be designated by the Government's complaint and not by either the condemnee or the court.

II

The value of future assessments cannot be awarded in addition to the fee value

As we noted earlier, the appellants present two distinct and unrelated claims in these appeals. In the claim we have just discussed, the avigation easement, all the appellants are claimants. In the claim we are now discussing, the future assessments, only the Water Company is the party in interest.

The Water Company contends it should be allowed to intervene in the condemnation proceedings for the purpose of asserting the right to compensation for the "taking" of the "perpetual and non-separable obligation to pay and maintain its² pro rata share of the cost of the construction, operation, and maintenance of the Company's facilities." (R. 50, 197.)

Appellee assumes, although appellant nowhere specifically says so, that the amount claimed by the Water Company is in addition to the amount of just compensation awarded for the taking of an unencum-

² The lands taken in this condemnation proceeding.

bered fee simple to all the lands condemned in this proceeding by the nine judgments previously entered. If the appellants seek no more than the redistribution of the amounts of the judgments determining just compensation, then appellee has no objection to the "intervention" of the Water Company for that purpose. The real parties in interest in such an event would be the other property owners and not the United States.

If, however, the appellants want to intervene for the purpose of asserting a further claim against the United States, then the petition to intervene was correctly denied by the district court. The Water Company has no claim above and beyond the amounts awarded as the fair market value of the property.

There are two broad issues which may be raised in a condemnation proceeding. The first is any objections which the defendants may have to the taking of the property, and appellants admit in their "amended notice of appearance" they have no objections or defenses to the taking (R. 191).

The second issue is just compensation. In determining this issue the United States is entitled to have the just compensation determined for the fee as an entirety, and all persons concerned must look to the amount thus determined for the value of their interests. "It is a fundamental principle, governing condemnation proceedings, where several interests are involved, such as estates for life, or in remainder, or leaseholds, or in reversion, in the property to be condemned, all should be combined in determining the value of the fee, after which the total value of the

fee can be subdivided in satisfaction of the values fixed upon the various interests involved.” *Carlock v. United States*, 53 F. 2d 926, 927 (C. A. D. C., 1931); *State of Nebraska v. United States*, 164 F. 2d 866 (C. A. 8, 1947), certiorari denied, 334 U. S. 815 (1948); *United States v. Adamant Co.*, 197 F. 2d 1 (C. A. 9, 1952), certiorari denied, *sub nom. Bullen, et al. v. Scoville*, 344 U. S. 903.

The Water Company was made a defendant in the condemnation proceeding. However, it made no attempt to present evidence to the court as to the value of the property condemned by the Government or the value of its interest in that property. To do this it needed neither a petition to intervene, nor even a notice of appearance, much less an amended one. Rule 71A, paragraph (e), F. R. C. P. provides: “* * * at the trial of the issue of just compensation, whether or not he [defendant] has previously appeared or answered, he may present evidence as to the amount of the compensation to be paid for his property, and he may share in the distribution of the award.” The complaint lists the Water Company as an interested party in all those tracts for which it is now making this further claim, viz, tracts 113 to 120, inclusive (R. 5). The Water Company either stipulated the compensation for the taking of the unencumbered fee simple title (R. 168, 169) or did not choose to appear at all, in the determination of just compensation.³ It did not appeal from the judg-

³ The Water Company also signed a stipulation on tract 116 (R. 173-178). This was a disclaimer of any interest in the funds paid for the taking “of the unencumbered fee simple title” of the tract (R. 177).

ments awarding just compensation for the tracts. As appellants' brief states, "It has also been held that an award of compensation under a state statute, is conclusive as to every matter which could have been included therein whether or not it was in fact included. *South Carolina Public Service Authority v. 11,754.8 Acres of Land*, 123 F. 2d 738." (C. A. 4, 1941) (Br. 33). The same is true in a federal proceeding. "The principle of res judicata will prevent subsequent litigation on questions of property interest which should have been raised in the condemnation suit." *United States v. Winn*, 83 F. Supp. 172 (W. D. S. Car., 1949); *Heiser v. Woodruff*, 327 U. S. 726, 735 (1946).

The stipulations on which these judgments were based provided the following amounts for the Water Company:

Tract 113	\$429.16 plus interest (R. 160, 161)
Tract 114	\$3,029.97 (R. 216)
Tract 115	"It is further stipulated and agreed by and between the above-named parties that the aforesaid sum shall be paid to John L. Roach and Bettie Joe Roach, husband and wife, and that from said sum there shall first be paid any and all liens, balance due on contract for purchase, taxes and encumbrances against said land * * *." (R. 125)
Tract 116	\$6,281.13 (R. 180, 181)
Tract 117	\$32.15 plus interest (R. 140)
Tract 118	\$1,875.44 plus interest (R. 151)
Tract 120	\$2,062.50 (R. 172)

Judgments awarding the just compensation for the unencumbered fee having been paid on all the tracts

condemned, the Water Company has no further recourse against the United States. "The condemnor, having paid into court just compensation for the land, has performed its full duty and is not concerned as to whom or when the court distributes; the condemnor is not even entitled to notice of the order of distribution." *United States v. Certain Lands in Town of Hempstead, Nassau County, N. Y.*, 129 F. 2d 918 (C. A. 2, 1942); *United States v. Dunnington*, 146 U. S. 338 (1892). This principle was specifically applied to claims as to future assessments in *People of Puerto Rico on Behalf of Isabela Irrigation Service v. United States*, 134 F. 2d 267 (C. A. 1, 1943), certiorari denied, 320 U. S. 753 (1943), where the Court stated:

As a matter of fact, if the People of Puerto Rico has a lien its proper course of action is against the award and is not a claim for additional compensation against the United States. In such event the United States has no real interest in the disposition of this case for it will be required to pay no more into the registry of the court regardless of the validity of the alleged lien. The parties in interest would be the People of Puerto Rico and the land-owners whose lands are situated in the irrigation system. 134 F. 2d 271.

III

**In any event future assessments are not a compensable
interest in property**

Appellants point out that the Water Company "has lost the right to assess those lands, the title

to which has passed to the plaintiff" (Br. 14). Appellee agrees, and if the Water Company's claim is entitled to further attention, it must be based on that lost right. Appellants assert the right to make future assessments "constituted covenants running with and liens upon that land." (R. 50, 197.) The appellee believes that these future assessments did not constitute a lien or encumbrance on the condemned land, and even if the future assessments were covenants running with the land, the Water Company was not entitled to an award in depreciation of that given to the fee owners.

All assessments outstanding at the time the tracts were taken have been paid and likewise the pro rata share of capital improvements made before the land was condemned has been paid. This is reflected either in higher prices to the fee owners who paid the capital levies or in payments directly to the Water Company as set out above. The United States does not, of course, seek any share in the ownership of the Water Company or the use of its irrigation water, although under appellants' theory it would seem the United States would be entitled to both.

The leading and controlling authority is *Mullen Benevolent Corp. v. United States*, 290 U. S. 89 (1933), where the lands in local improvement districts were subjected by statute to assessment, and if necessary, reassessment to pay the bonds which had been sold for sewer and sidewalk improvements. Between the time of the original assessment and the time when reassessment became necessary, the United

States had condemned all of the lands in the improvement districts. The Supreme Court said:

It is true these [re-assessments] could not thereafter be levied on property which had passed to the United States, but this does not mean that the Government appropriated the right to assess them *in futuro*, nor that it took the benefit which might accrue to bondholders consequent on such future levies. By purchase of the lands the United States at most frustrated action by the city to replenish the assessment fund to which alone the bondholder must look for payment of his bonds. But this was not a taking of the bondholder's property. *Omnia Commercial Co. v. United States*, 261 U. S. 502. (290 U. S. 94, 95.)

This decision was followed in *People of Puerto Rico on Behalf of Isabela Irrigation Service v. United States*, 134 F. 2d 267 (C. A. 1, 1943), certiorari denied, 320 U. S. 753 (1943). There had been an agreement on compensation for the tangible items taken. The claim on appeal was based upon appellant's right to make future assessments upon the lands in the irrigation system, in addition to compensation for tangible items. The theory was either that such right was a franchise or that appellant had a lien on the lands in question for the assessments which it may levy in the future. The court rejected both arguments. "The right to levy special assessments in no way enhanced the value of the property condemned." 134 F. 2d 271. The court also held that under pertinent statutory provisions, the lien arose only after the annual assessments were made, and were, insofar as future assess-

ments were concerned, only potential liens which cannot be satisfied out of money paid into court under 40 U. S. C. sec. 258a.

Similarly in *United States v. Anderson Cottonwood Irr. Dist.*, 19 F. Supp. 740 (N. D. Cal., 1937), an irrigation district was formed under the laws of the State of California. Prior to the purchase of land in the irrigation district by the United States, the district had lawfully sold certain bonds. The lands were, by the terms of the California statute, subject to assessment each year during the term of the bonds for the purpose of raising money to retire the bonds and for other costs. The court held there was no intention on the part of the legislature to create an indirect lien for subsequent assessments upon the property within the district. The court cancelled liens created by assessment levied subsequent to purchase of the lands by the United States, and restrained the future levy of such assessments. *United States v. Aho*, 68 F. Supp. 358 (D. Ore., 1944), follows the legal reasoning of the three cases just discussed. The United States was condemning land in a drainage district organized pursuant to the laws of the State of Oregon. The cost of constructing and operating the drainage works was paid by assessment on the land in the district. The court interpreted the Oregon law as having "created an encumbrance on lands in the Drainage District which holds the land itself for future assessments." 68 F. Supp. 366. It was therefore held that:

* * * the jury should be permitted to fix the value of the lands *benefited*, free from the burden of future assessments so that the taking will

not be without just compensation. On the other hand, if the United States is accepting title subject to future assessments, that should be made clear. 68 F. Supp. 366. [Emphasis supplied.]

The rationale of the above cases is clear. Unless the statute or other authority creating the assessment right contemplated that future assessments should constitute a present lien, the future assessment is not an interest in the property for which compensation may be claimed in a condemnation proceeding. An examination of the pertinent documents in the present appeal shows that the assessments and calls for the subscription price of capital stock were liens only as made. The Articles of Incorporation provide, "the land * * * shall be subject to pro rata assessments * * *. The assessments *so made* shall be a lien upon said stock and upon the land * * *." (R. 93.) The Bylaws provide, "*The payments due for the purchase of said stock and the calls and assessments thereon made by the Company shall be a lien * * *.*" (R. 105.) And just preceding the quoted language, "*Assessments and the subscription price of said shares shall become due from time to time, as they are called or made and levied * * * and be a lien on said lands * * *.*" (R. 104.) [Emphasis supplied.] The same language appears in the contract for the sale of Water Company stock (R. 120). It is obvious that no lien for future assessments was intended.

Appellee has found no case, and appellants cite none, with a direct holding that covenants running

with condemned land are compensable interests in condemnation proceedings. Certainly, neither *United States v. Certain Lands at Great Neck, N. Y.*, 49 F. Supp. 265 (E. D. N. Y., 1943), nor *United States v. Florea*, 68 F. Supp. 367 (D. Ore., 1945), both of which discuss covenants running with the land, are direct authority. In the *Great Neck* case, the petitioners were asking to intervene on three grounds, one of which was that petitioners owned an easement and another was that they enjoyed the benefit of a covenant which ran, the burden of which was on condemned land. The court decided there was a right to intervene based on the ownership of the easement. Then, it said:

Since the petition to intervene must be granted, perhaps nothing need be said with reference to the two remaining grounds upon which intervenors rely. Probably it would not be thought that the order to be entered hereon should in any case prescribe a limitation upon the proof which the intervenors may offer, but again to preclude controversy on the subject it may be appropriate to say as clearly as possible that no such limitation is hereby intended. 49 F. Supp. 267.

The court was not ruling on the validity of the claim, it was merely preserving to the intervenors the right to make it.

Again, in the *Florea* case, involving lands in a drainage district, the court discusses covenants running with the land, but clearly states "Of course it cannot be contended that in this situation there are any covenants * * *". 68 F. Supp. 374. The answer

which the court reaches can more readily be explained on the existence of a drainage easement over the condemned lands, and the obligations placed upon the land by statute which in the similar case of *United States v. Aho*, were held to be liens. In any event, the court found: " * * * a vast gulf, both practically and theoretically, between irrigation and drainage-diking. Irrigation water can be withheld so that no use can be made of the land, unless there is a payment of assessments. Drainage-diking benefits cannot be withheld without substantial and irreparable injury to the community. The benefits are thus irrevocable to the land itself. By no possibility can it be held that they do not touch and concern both the benefited and the burdened land. In irrigation, when the easement for carriage is destroyed or the real property right to have the water is done away with by abandonment, failure to make beneficial use, or waiver, there is neither benefit nor burden to touch and concern the land." 68 F. Supp. 371.

Basically the Water Company is a business enterprise selling water, even though it is mutual and non-profit. Why should it be compensated for, in effect, the loss of its customers? Other business enterprises are not. *Kelletville Gas Co. v. United States*, 56 F. Supp. 919 (W. D. Penna., 1944); *Deepe v. United States*, 103 Colo. 294, 86 P. 2d 242 (1938).

The fact that there are no lands which can be added to the project to take the place of the condemned lands is immaterial in determining the value of the Water Company's interest in the condemned lands.

This argument is similar to the one that the Government must pay for the going concern value of a business when it condemns a business premises if the owner cannot find a place to relocate. "When a condemnor has taken fee title to business property, there is reason for saying that the compensation due should not vary with the owner's good fortune or lack of it in finding premises suitable for the transference of going-concern value. In the usual case most of it can be transferred; in the remainder the amount of loss is so speculative that proof of it may justifiably be excluded. See *Sawyer v. Commonwealth*, 182 Mass. 245, 65 N. E. 52, per Holmes, C. J. By an extension of that reasoning the same result has been reached even upon the assumption that no other premises whatever were available. *Mitchell v. United States*, 267 U. S. 341." *Kimball Laundry Co. v. United States*, 338 U. S. 1, 12 (1949).

The matters discussed in this point are not, of course, of direct concern to the United States, as is stated in Point II. They are outlined here to give the court a complete view of potential problems presented by this appeal.

CONCLUSION

For the foregoing reasons it is submitted that the orders of the district court should be affirmed.

Respectfully,

PERRY W. MORTON,
Assistant Attorney General,
JACK D. H. HAYS,
United States Attorney,
Phoenix, Arizona,

ROGER P. MARQUIS,
A. DONALD MILEUR,
Attorneys,

Department of Justice, Washington, D. C.

SEPTEMBER 1956.

No. 15113
IN THE
United States
Court of Appeals

For the Ninth Circuit
1956 Term

GOODYEAR FARMS, a corporation;
ADAMAN MUTUAL WATER COMPANY,
a corporation; B. W. MULLINS,
JAMES H. SHARP, GEORGE W. BUSEY,
CARLON H. HINTON and VERNA
HINTON, his wife, et al,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

GOODYEAR FARMS, a corporation;
ADAMAN MUTUAL WATER COMPANY,
a corporation; BILL W. MULLINS,
and RALPH ASHBY and GRACE ASHBY,
husband and wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

FILE

DEC 29 19

PAUL P. O'BRIEN

APPEAL
FROM THE
UNITED
STATES
DISTRICT
COURT FOR
THE
DISTRICT
OF ARIZONA

PETITION FOR REHEARING AND MEMORANDUM
OF POINTS AND AUTHORITIES

EDWARD JACOBSON
SNELL & WILMER

Attorneys for Appellants

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No. 15113
IN THE
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GOODYEAR FARMS, a corporation;
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husband and wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL
FROM THE
UNITED
STATES
DISTRICT
COURT FOR
THE
DISTRICT
OF ARIZONA

PETITION FOR HEARING

Appellants, by their counsel, hereby petition this Court for a rehearing with the object of securing a supplemental opinion

further defining this Court's direction concerning the extent of recovery permissible, if any, in this proceeding to one class of appellants considered by this Court in its Per Curiam Opinion filed December 3, 1956. Said class of appellants are those named defendants in the condemnation proceeding who also own tracts contiguous to their condemned acreage and for which non-condemned contiguous tracts they have already been awarded severance damages but for which said non-condemned contiguous tracts no compensation has been made them for "aircraft takings" (being such damage as is alleged to have resulted from four hundred take-offs and landings of jet planes over said lands at such low altitudes as to amount to an appropriation).

No request for oral hearing is made with this Petition. Nor is it the purpose of this Petition in anywise to object to any portion of the Per Curiam Opinion rendered. Instead, the sole purpose of this Petition is to insure that appellants proceed with the trial of that class of claims above described in such forum as is in accordance with the intent and direction of this Court and so avoid any further delay.

The grounds for this Petition are based upon the following language in the Per Curiam Opinion and particularly upon the italicized portion thereof:

"The first is the claim of lands contiguous to the air field that take-offs and landings of four hundred jet planes per day over lands in more or less proximity to the air field will amount to appropriation. We are clear that, if any such right exists as to lands outside the area condemned, it cannot be adjudicated in the present proceeding. *If an owner had lands here condemned and contiguous land lying outside the boundaries, he would have the right of compensation for damages suffered by the whole tract.* But in this event he is already a defendant and can appeal from the final judgment if he has not been awarded compensation for all of his rights taken or damaged."

Appellants are concerned that if the Court below construes this direction to refer to severance damages as distinguished from "air-

craft takings" on such non-condemned contiguous lands and if this Court did not intend to so limit permissible recovery in this proceeding, appellants will again be required to appeal to this Court or risk the loss of compensation for such takings by operation of *res judicata*. Contrariwise, if the Court below construes this direction to include the providing of compensation for "aircraft takings" in addition to severance damage on such non-condemned contiguous tracts in these proceedings, such being opposite to the appellee's construction, it can be expected that appellee might well be constrained to appeal, thus again occasioning further delay.

Therefore, appellants hereby petition this Court for a rehearing with the object of securing a supplemental opinion such as will direct the parties as to the intention of this Court with respect to the above described class of claims.

EDWARD JACOBSON
SNELL & WILMER
400 Security Building
Phoenix, Arizona
Attorneys for Appellants

MEMORANDUM OF POINTS AND AUTHORITIES

At the time of oral argument before the Court, discussion was had concerning the case of *Boyd v. United States*, 222 F. 2d 493. This case appears to present the majority rule concerning the limit of recovery in condemnation proceedings for non-condemned tracts which are contiguous to and owned by owners of condemned tracts. On its facts the case presents a situation of startling similarity to the case at bar.

In the *Boyd* case, the United States of America condemned 15.7 acres of an 82 acre farm. The 15.7 acre condemned tract was to serve as the northern tip of a 5,139.47 acre air base. The Boyds objected to the \$1375 compensation awarded them by the District Court in that it failed to include any damages to the non-condemned contiguous 66.3 acres occasioned by numerous

low-flying planes from the base occupying the airspace above. By the same token, the Boyds objected to the District Court's refusal to admit any evidence as to such aircraft activity or proof as to diminution in market value occasioned by such alleged "aircraft takings."

The Circuit Court of Appeals (8th Circuit), after reciting the general severance damage rule, held:

1. No compensation should be awarded in the condemnation proceedings for damage that might result to a contiguous tract simply as a general consequence of the operation of the air base which damage would be no different (except presumably in degree) than that occasioned by neighbors whose farms adjoined the air base but had no land condemned therefor.
2. Such "general" damage gives rise to an independent right of compensation for the appropriation of an easement (citing *United States v. Causby*, 328 U. S. 256, 66 S. Ct. 1062, 90 L. Ed. 206) presumably to be pursued in the Court of Claims as in the *Causby* case.
3. The 15.7 acres taken by condemnation was used only as the northern tip of the air base properties, and not as the runway or other key area which ". . . would make it capable of contributing a direct and identifiable element of depreciation, out of the componentry of that which otherwise, as a matter of legal certainty, would simply be attributed to the project generally or as a whole . . .". Therefore, the rule stated in the paragraphs numbered 1 and 2 above applied.

In the case at bar, those appellants owning non-condemned contiguous lands had their condemned lands used only as vacant "border area", being the phrase used by the Court in the *Boyd* case to illustrate those who were encompassed by the rule announced.

Appellants believe it to be the intention of this Court that the rule of the *Boyd* case apply to those appellants who had land condemned but who also owned non-condemned contiguous tracts

upon which they allege "aircraft takings". Appellants believe a supplemental opinion from this Court so stating would materially aid in the prompt administration of justice, the prevention of further appeals and delay, and the protection of all parties from the possible operation of the doctrine of res judicata in a manner such as would prejudice substantive rights.

Respectfully submitted,

EDWARD JACOBSON

SNELL & WILMER

400 Security Building

Phoenix, Arizona

Attorneys for Appellants

CERTIFICATE OF COUNSEL

I, Edward Jacobson, counsel for the appellants in the above entitled action, do hereby certify that the foregoing petition for a rehearing of this cause and memorandum of authorities in support thereof is presented in good faith and not for delay.

EDWARD JACOBSON

Counsel for the Appellants

No. 15115

**United States
Court of Appeals**
for the Ninth Circuit

RALPH O. HUTCHENS,

Appellant,

vs.

LOUIS B. FAAS, LEONARD FAAS, WALTER
FAAS, RUDOLPH FAAS, Individually and as
Partners, Doing Business as King O'Lawn
Mfg. Co., and KING O'LAWN MFG. CO., a
Corporation,

Appellees.

Transcript of Record

In Two Volumes

Volume I

(Pages 1 to 80)

FILED

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PAUL P. O'BRIEN, C

**Appeal from the United States District Court for the
Southern District of California,
Central Division.**

No. 15115

United States
Court of Appeals
for the Ninth Circuit

RALPH O. HUTCHENS,

Appellant,

vs.

LOUIS B. FAAS, LEONARD FAAS, WALTER
FAAS, RUDOLPH FAAS, Individually and as
Partners, Doing Business as King O'Lawn
Mfg. Co., and KING O'LAWN MFG. CO., a
Corporation,

Appellees.

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Volume I
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Appeal from the United States District Court for the
Southern District of California,
Central Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Los Angeles 17, California.

In the District Court of the United States, Southern
District of California, Central Division

Civil Action No. 18564-WM

RALPH O. HUTCHENS,

Plaintiff,

vs.

LOUIS B. FAAS; LEONARD FAAS; WALTER
FAAS; RUDOLPH FAAS; Individually and
as Partners, Doing Business as KING O'LAWN
MFG. CO.; KING O'LAWN, INC., a Califor-
nia Corporation; JANE DOES ONE to TEN,
Inclusive; JOHN DOES ONE to THIRTY,
Inclusive; DOE CORPORATIONS ONE to
TWENTY, Inclusive; ROE COMPANIES,
PARTNERSHIPS ONE to TWENTY, In-
clusive,

Defendants.

REQUEST FOR ADMISSION OF FACTS

To Lyon & Lyon, 811 West Seventh Street, Los An-
geles 17, California, Attorneys for Defendants,
Louis B. Faas, Leonard Faas, Walter Faas,
Individually and as Partners, Doing Business
as King O'Lawn Mfg. Co., and King O'Lawn,
Inc., a California Corporation:

Please take notice that the plaintiff hereby re-
quests the defendants, pursuant to Rule 36 of the
Federal Rules of Civil Procedure, to admit within
ten (10) days after service of this request, for the

purposes of the above-entitled action only, and [2*] subject to all pertinent objections to admissibility which may be interposed at the trial, the truth of the following facts:

1. That the attached advertising piece identified as Exhibit A was printed with the permission of defendants,

- (a) King O'Lawn Manufacturing Company,
- (b) King O'Lawn, Inc.

2. That said Exhibit A contains four illustrations of lawn edgers and trimmers identified as,

- (a) Junior Model,
- (b) Gardener Model,
- (c) Special Model,
- (d) Senior Model.

3. That since October 4, 1955, defendants King O'Lawn Manufacturing Company or King O'Lawn, Inc., hereinafter referred to jointly as King O'Lawn, have manufactured lawn trimmers and edgers of the structure shown in said Exhibit A and identified as,

- (a) Junior Model,
- (b) Gardener Model,
- (c) Special Model,
- (d) Senior Model.

4. That since October 4, 1955, defendants King O'Lawn have sold lawn trimmers and edgers of

the structure shown in said Exhibit A and identified as,

- (a) Junior Model,
- (b) Gardener Model,
- (c) Special Model,
- (d) Senior Model.

5. That said illustrations of,

- (a) Junior Model,
- (b) Gardener Model,
- (c) Special Model,
- (d) Senior Model, [3]

in said Exhibit A depict a lawn edger and trimmer having an engine-supporting base mounted on wheels, which base can be angularly adjusted relative to the surface on which said wheels rest.

6. That said illustrations of ,

- (a) Junior Model,
- (b) Gardener Model,
- (c) Special Model,
- (d) Senior Model,

in said Exhibit A depict a lawn edger and trimmer having a rigid rotatable cutting member that can be driven at a desired constant speed, and at a speed that is independent of the rate at which the lawn trimmer and edger is manually moved by the upwardly and rearwardly extending handle forming a part of the device.

7. That said illustrations of

- (a) Junior Model,
- (b) Gardener Model,
- (c) Special Model,
- (d) Senior **Model**,

in said Exhibit A show an elongate member extending forwardly from one side of the engine-supporting base with said member being so mounted on said base that said base and member are concurrently adjustable in angular relationship to the surface on which the supporting wheels of said base rest.

8. That said illustrations of

- (a) Junior Model,
- (b) Gardener Model,
- (c) Special Model,
- (d) Senior Model,

in said Exhibit A show an elongate member extending forwardly from one side of the engine-supporting base, which member rotatably supports a rigid cutter adjacent the forward end thereof.

9. That the rotatable cutter shown in said illustrations of, [4]

- (a) Junior Model,
- (b) Gardener Model,
- (c) Special Model,
- (d) Senior Model,

in said Exhibit A can enter an area for trimming and edging purposes which is too small to accommodate the engine-supporting base of the device.

10. That the rotatable cutter shown in said illustrations of

- (a) Junior Model,
- (b) Gardener Model,
- (c) Special Model,
- (d) Senior Model,

in Exhibit A can be driven at a desired constant speed when disposed in an area too small to accommodate the engine-supporting base of the device.

11. That the rotatable cutter shown in said illustrations of

- (a) Junior Model,
- (b) Gardener Model,
- (c) Special Model,
- (d) Senior Model,

in Exhibit A can be driven at a desired constant speed when disposed in a vertical or horizontal position, or a position there-between.

Dated: December 2, 1955.

WILLIAM C. BABCOCK,

FREDERICK E. MUELLER,

By /s/ WILLIAM C. BABCOCK,

Attorneys for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed December 5, 1955.

[Title of District Court and Cause.]

PLAINTIFF'S INTERROGATORIES
TO DEFENDANTS

To Lyon & Lyon, 811 West Seventh Street, Los Angeles 17, California, Attorneys for Defendants, Louis B. Faas, Leonard Faas, Walter Faas, Individually and as Partners, Doing Business as King O'Lawn Mfg. Co., and King O'Lawn, Inc., a California Corporation:

The plaintiff requests that each of the defendants named above answer under oath in accordance with Rule 33 of the Federal Rules of Civil Procedure, the following interrogatories:

1. Have either of the defendants, King O'Lawn Mfg. Co., or King O'Lawn, Inc., hereinafter referred to jointly as King O'Lawn, [8] authorized the printing of the advertising piece attached hereto and identified as Exhibit A?

2. Have either of the defendants King O'Lawn since October 4, 1955, manufactured lawn edgers and trimmers as shown in said Exhibit A that are titled therein as

- (a) Junior Model,
- (b) Gardener Model,
- (c) Special Model,
- (d) Senior Model?

3. Have either of the defendants King O'Lawn since October 4, 1955, sold lawn edgers and trimmers

as shown in said Exhibit A that are titled therein as

- (a) Junior Model,
- (b) Gardener Model,
- (c) Special Model,
- (d) Senior Model?

4. Does said advertising piece, Exhibit A, depict a portion of the externally viewable structure of models

- (a) Junior Model,
- (b) Gardener Model,
- (c) Special Model,
- (d) Senior Model,

as manufactured by the defendants King O'Lawn since October 4, 1955?

5. If the answer to any one of the Interrogatories 4(a), 4(b), 4(c), or 4(d) is negative, what are the differences in structure of the edger manufactured from that shown in said Exhibit A?

6. Does said advertising piece, Exhibit A, depict a portion of the externally viewable structure of models

- (a) Junior Model,
- (b) Gardener Model,
- (c) Special Model, [9]
- (d) Senior Model,

sold by the defendants King O'Lawn since October 4, 1955?

7. If the answer to any one of the Interrogatories 6(a), 6(b), 6(c), or 6(d) is negative, state the differences in structure of the edger sold from that shown in said Exhibit A.

8. On what date was said

- (a) Junior Model,
- (b) Gardener Model,
- (c) Special Model,
- (d) Senior Model

first sold by the defendants King O'Lawn?

9. On what date was said

- (a) Junior Model,
- (b) Gardener Model,
- (c) Special Model,
- (d) Senior Model

first manufactured by the defendants King O'Lawn?

10. Does the

- (a) Junior Model,
- (b) Gardener Model,
- (c) Special Model,
- (d) Senior Model

as shown in said Exhibit A include an engine adapted to drive a rotating cutter at a constant speed, irrespective of the rate at which the edger is manually moved over the ground?

11. Does the

- (a) Junior Model,
- (b) Gardener Model,
- (c) Special Model,
- (d) Senior Model

as shown in said Exhibit A include a wheel-supported base on which an engine is mounted, which base may be angularly adjusted relative to the surface on which said wheels rest?

12. Can the rotating cutter of the

- (a) Junior Model,
- (b) Gardener Model,
- (c) Special Model,
- (d) Senior Model

be inserted for trimming or edging purposes into an area that is too small for the engine-supporting portion of the device to enter?

13. If the answer to Interrogatories 12(a), 12(b), 12(c), or 12(d) is in the affirmative, can the cutter be driven at a substantially constant speed?

14. If the answer to Interrogatories 12(a), 12(b), 12(c), or 12(d) is in the affirmative, can the cutter be driven at a substantially constant speed when the engine-supporting portion of the device is stationary?

15. At the trial hearing will defendants contend that any one of the patents listed in Paragraph IX

of their Answer to plaintiff's Amended Complaint discloses a device having an engine-driven rotatable cutter, which cutter can be driven at a substantially constant speed when disposed in an area too small for the engine-supporting portion of the device to enter?

16. If the answer to Interrogatory No. 15 is in the affirmative, state which of the patents will be relied upon as disclosing a device capable of so operating.

17. Will defendants contend at the trial that any one of them, more than one year prior to March 14, 1949, the filing date of the application which resulted in Letters Patent No. 2,618,919,

- (a) made,
- (b) used,
- (c) sold,

a device as defined in at least one claim of said patent? [11]

18. If the answer to Interrogatories 17(a), 17(b) or 17(c) is in the affirmative, state the names of said defendants.

19. Will the defendants contend at the trial that more than one year prior to March 14, 1949, the filing date of the application which resulted in Letters Patent No. 2,618,919, Sam H. Boggs,

- (a) made,

(b) used,

(c) sold,

a device as defined in at least one claim of said patent?

20. Will defendants contend at the trial that more than one year prior to June 16, 1950, the filing date of the application which resulted in Letters Patent No. 2,719,398, Sam H. Boggs,

(a) made,

(b) used,

(c) sold,

a device as defined in at least one claim of said patent?

21. If the answer to Interrogatories 19(a), 19(b), 19(c) is in the affirmative, describe said device.

22. If the answer to Interrogatories 20(a), 20(b), 20(c) is in the affirmative, describe said device.

23. What have been the operating functions of,

(a) King O'Lawn Manufacturing Company, Los Angeles, California.

(b) King O'Lawn, Inc., a corporation, Los Angeles, California,

since November 25, 1952, to the present date?

24. What are the names of the directors and the length of service of each as such of King O'Lawn, Inc., since November 25, 1952, to the present date?

25. What are the names of the officers and the length of service of each as such of King O'Lawn Manufacturing Company, since November 25, 1952, to the present date? [12]

26. Has

- (a) King O'Lawn Manufacturing Company,
- (b) King O'Lawn, Inc.,

since November 25, 1952, made assignment for the benefit of creditors?

27. If the answer to Interrogatories 26(a) or 26(b) is in the affirmative, state in detail the circumstances surrounding said assignment, and give the names of the creditors for whom said assignment was made.

28. Has

- (a) King O'Lawn Manufacturing Company,
- (b) King O'Lawn, Inc.,

at any period since November 25, 1952, been operated by an assignee?

29. If the answer to Interrogatories 28(a) or 28(b) is in the affirmative, what is the name and address of said assignee, and what are the dates between which assignee acted in an operating capacity?

30. What portion of King O'Lawn Manufacturing Company is owned by

- (a) Louis B. Fass,
- (b) Leonard Faas,
- (c) Walter Faas,
- (d) Rudolph Faas?

Please take notice that a copy of such answers must be served upon the undersigned within fifteen (15) days after the service of these interrogatories.

Dated: December 1, 1955.

WILLIAM C. BABCOCK,

FREDERICK E. MUELLER,

By /s/ WILLIAM C. BABCOCK,

Attorneys for Plaintiff.

[Endorsed]: Filed December 5, 1955. [13]

[Title of District Court and Cause.]

DEFENDANTS' ANSWERS TO PLAINTIFF'S
INTERROGATORIES

Comes now defendants and in answer to Interrogatories propounded by Plaintiff, submit the following:

I.

Interrogatory I:

Have either of the defendants, King O'Lawn Mfg. Co., or King O'Lawn, Inc., hereinafter referred to

jointly as King O'Lawn, authorized the printing of the advertising piece attached hereto and identified as Exhibit A?

Answer to Interrogatory I:

Yes. [16]

II.

Interrogatory II:

Have either of the defendants King O'Lawn since October 4, 1955, manufactured lawn edgers and trimmers as shown in said Exhibit A that are titled therein as

- (a) Junior Model,
- (b) Gardener Model,
- (c) Special Model,
- (d) Senior Model?

Answer to Interrogatory II:

Yes.

III.

Interrogatory III:

Have either of the defendants King O'Lawn since October 4, 1955, sold lawn edgers and trimmers as shown in said Exhibit A that are titled therein as

- (a) Junior Model,
- (b) Gardener Model,
- (c) Special Model,
- (d) Senior Model?

Answer to Interrogatory III:

Yes.

IV.

Interrogatory IV:

Does said advertising piece, Exhibit A, depict a portion of the externally viewable structure of models

- (a) Junior Model,
- (b) Gardener Model,
- (c) Special Model,
- (d) Senior Model, [17]

as manufactured by the defendants King O'Lawn since October 4, 1955?

Answer to Interrogatory IV:

Yes.

V.

Interrogatory V:

If the answer to any one of the Interrogatories 4(a), 4(b), 4(c), or 4(d) is negative, what are the differences in structure of the edger manufactured from that shown in said Exhibit A?

Answer to Interrogatory V:

See answer to Interrogatory IV.

VI.

Interrogatory VI:

Does said advertising piece, Exhibit A, depict a portion of the externally viewable structure of models

- (a) Junior Model,
- (b) Gardener Model,

(c) Special Model,

(d) Senior Model,

sold by the defendants King O'Lawn since October 4, 1955?

Answer to Interrogatory VI:

Yes.

VII.

Interrogatory VII:

If the answer to any one of the Interrogatories 6(a), 6(b), 6(c), or 6(d) is negative, state the differences in structure of the edger sold from that shown in said Exhibit A.

Answer to Interrogatory VII:

See answer to Interrogatory VI. [18]

Interrogatory VIII:

On what date was said

(a) Junior Model,

(b) Gardener Model,

(c) Special Model,

(d) Senior Model

first sold by the defendants King O'Lawn?

Answer to Interrogatory VIII:

(a) Approximately December of 1950,

(b) Approximately July of 1949,

(c) Approximately July or August, 1951,

(d) Approximately July or August, 1951.

IX.

Interrogatory IX:

On what date was said

- (a) Junior Model, .
- (b) Gardener Model,
- (c) Special Model,
- (d) Senior Model

first manufactured by the defendants King O'Lawn?

Answer to Interrogatory IX:

- (a) Approximately December of 1950,
- (b) Approximately July of 1949,
- (c) Approximately July or August, 1951,
- (d) Approximately July or August, 1951.

X.

Interrogatory X:

Does the

- (a) Junior Model,
- (b) Gardener Model, [19]
- (c) Special Model,
- (d) Senior Model

as shown in said Exhibit A include an engine adapted to drive a rotating cutter at a constant speed, irrespective of the rate at which the edger is manually moved over the ground?

Answer to Interrogatory X:

Yes.

XI.

Interrogatory XI:

Does the

- (a) Junior Model,
- (b) Gardener Model,
- (c) Special Model,
- (d) Senior Model

as shown in said Exhibit A include a wheel-supported base on which an engine is mounted, which base may be angularly adjusted relative to the surface on which said wheels rest?

Answer to Interrogatory XI:

Yes. In each model (a), (b), (c), and (d) the base is supported by two rear wheels and one forward wheel. The supporting arm for the forward wheel may be angularly adjusted relative to the base, so that the base may be angularly adjusted about the axis of the rear wheels, thereby to adjust the base angularly relative to the ground.

XII.

Interrogatory XII:

Can the rotating cutter of the

- (a) Junior Model,
- (b) Gardener Model,
- (c) Special Model, [20]
- (d) Senior Model

be inserted for trimming or edging purposes into an area that is too small for the engine-supporting portion of the device to enter?

Answer to Interrogatory VII:

No. The front wheel in each model (a), (b), (c), and (d) extends forward substantially to the axis of the cutter blade, and the distance between the remote sides of the wheel and cutter blade is substantially the same as the engine-supporting portion of the device when the cutter blade is in a vertical position, and is greater than the engine-supporting portion when the cutter is in its horizontal position.

XIII.

Interrogatory XIII:

If the answer to Interrogatories 12(a), 12(b), 12(c), or 12(d) is in the affirmative, can the cutter be driven at a substantially constant speed?

Answer to Interrogatory XIII:

No answer required.

XIV.

Interrogatory XIV:

If the answer to Interrogatories 12(a), 12(b), 12(c), or 12(d) is in the affirmative, can the cutter be driven at a substantially constant speed when the engine-supporting portion of the device is stationary?

Answer to Interrogatory XIV:

No answer required. [21]

XV.

Interrogatory XV:

At the trial hearing will defendants contend that any one of the patents listed in Paragraph IX of their Answer to plaintiff's Amended Complaint discloses a device having an engine-driven rotatable cutter, which cutter can be driven at a substantially constant speed when disposed in an area too small for the engine-supporting portion of the device to enter?

Answer to Interrogatory XV:

Yes.

XVI.

Interrogatory XVI:

If the answer to Interrogatory No. 15 is in the affirmative, state which of the patents will be relied upon as disclosing a device capable of so operating.

Answer to Interrogatory XVI:

1. Martin—827,548, issued July 31, 1906.
2. Reed—1,141,268, issued June 1, 1915.
3. Dibble—1,798,402, issued Mar. 31, 1931.
4. Seymour—1,447,606, issued Mar. 6, 1923.
5. Adams—2,354,095, issued July 18, 1944.
6. Hillyer—2,365,408, issued Dec. 19, 1944.
7. Arsneau—2,435,192, issued Feb. 3, 1948.
8. Irwin, Jr.—2,439,607, issued Apr. 13, 1948.
9. Moss, et al.—2,524,466, filed Sept. 26, 1946.
10. McKinstry—2,597,017, filed May 9, 1949.
11. Knight*—2,274,902, issued Mar. 3, 1942.

*Notice of this United States patent is given under Title 35, U.S.C. Section 282, and a copy is attached hereto. [22]

XVII.

Interrogatory XVII:

Will defendants contend at the trial that any one of them, more than one year prior to March 14, 1949, the filing date of the application which resulted in Letters Patent No. 2,618,919,

- (a) made,
- (b) used,
- (c) sold,

a device as defined in at least one claim of said patent?

Answer to Interrogatory XVII:

No, inasmuch as defendants are unable to find any claim in the Hutchens Letters Patent No. 2,618,919 which defines a device made, used, or sold at any time by defendants, including specifically any of the models shown in Exhibit A.

XVIII.

Interrogatory XVIII:

If the answer to Interrogatories 17(a), 17(b) or 17(c) is in the affirmative, state the names of said defendants.

Answer to Interrogatory XVIII:

No answer required.

XIX.

Interrogatory XIX:

Will the defendants contend at the trial that more than one year prior to March 14, 1949, the filing

date of the application which resulted in Letters Patent No. 2,618,919, Sam H. Boggs,

- (a) made,
- (b) used,
- (c) sold

a device as defined in at least one claim of said patent? [23]

Answer to Interrogatory XIX:

No, but defendants will contend that none of the claims of the Hutchens Letters Patent No. 2,618,919 define a device which is patentably distinct from the device depicted in the Sam H. Boggs patent No. 2,538,230; and defendants will further contend that Sam H. Boggs did, prior to his filing date of December 27, 1947, (a) make, (b) use, and (c) sell at least one lawn trimmer substantially identical to the drawings of said patent, and that the drawings in said patent were prepared from an actual operating model of said lawn trimmer.

XX.

Interrogatory XX:

Will defendants contend at the trial that more than one year prior to June 16, 1950, the filing date of the application which resulted in Letters Patent No. 2,719,398, Sam H. Boggs,

- (a) made,
- (b) used,
- (c) sold,

a device as defined in at least one claim of said patent?

Answer to Interrogatory XX:

No, but defendants will contend that none of the claims of the Hutchens Letters Patent No. 2,719,398 define a device which is patentably distinct from the device depicted in the Sam H. Boggs patent No. 2,538,230; and defendants will [24] further contend that Sam H. Boggs did, prior to his filing date of December 27, 1947, (a) make, (b) use, and (c) sell at least one lawn trimmer substantially identical to the drawings of said patent, and that the drawings in said patent were prepared from an actual operating model of said lawn trimmer.

XXI.

Interrogatory XXI:

If the answer to Interrogatories 19(a), 19(b), 19(c) is in the affirmative, describe said device.

Answer to Interrogatory XXI:

No answer required.

XXII.

Interrogatory XXII:

If the answer to Interrogatories 20(a), 20(b), 20(c) is in the affirmative, describe said device.

Answer to Interrogatory XXII:

No answer required.

XXIII.

Interrogatory XXIII:

What have been the operating functions of,

- (a) King O'Lawn Manufacturing Company,
Los Angeles, California,
- (b) King O'Lawn, Inc., a corporation, Los
Angeles, California,

since November 25, 1952, to the present date?

Answer to Interrogatory XXIII:

- (a) Manufacturing and selling power mowers
and power edgers, attachments, parts and
accessories; [25]
- (b) King O'Lawn, Inc., is an inactive com-
pany, has conducted no business whatso-
ever, and is without assets or liabilities.

XXIV.

Interrogatory XXIV:

What are the names of the directors and the length of service of each as such of King O'Lawn, Inc., since November 25, 1952, to the present date?

Answer to Interrogatory XXIV:

- Louis D. Faas, since May 6, 1954.
- Leonard A. Faas, since May 6, 1954.
- Bernice H. Faas, since May 6, 1954.

XXV.

Interrogatory XXV:

What are the names of the officers and the length of service of each as such King O'Lawn Manufacturing Company, since November 25, 1952, to the present date?

Answer to Interrogatory XXV:

No officers, as King O'Lawn Manufacturing Company is a co-partnership.

XXVI.

Interrogatory XXVI:

Has

(a) King O'Lawn Manufacturing Company

(b) King O'Lawn, Inc.

since November 25, 1952, made assignment for the benefit of creditors?

Answer to Interrogatory XXVI:

(a) Yes.

(b) No. [26]

XXVII.

Interrogatory XXVII:

If the answer to Interrogatories 26(a) or 26(b) is in the affirmative, state in detail the circumstances surrounding said assignment, and give the names of the creditors for whom said assignment was made.

Answer to Interrogatory XXVII:

A copy of the assignment of February 1, 1955, is attached hereto:

The names of the creditors are as follows:

Acme Gasket, Inc.

Acme Green Printing Co.

Addressograph Sales & Service

Albright Display Co.

Albrights

Alemite Co.

Amazol Co.

Angelus Steel Treating Co.

Andrews Hardware & Metal

Arrow Paint Co.

T. Ashbrook

Associated Graphic Arts

Acme Fast Freight, Inc.

Ad-Craft Sign Co., Inc.

American Linen Supply Co.

W. A. Bullis

Bearing House

Bell Equipment Co.

Andrew Brown Co.

W. M. Butcher & Ethel L. Butcher

Berg Typewriter Co. [27]

City Business Directory Publishers

C & H Supply Co.

California Spring Co.

A. M. Castle Co.

Clinton Machine Co.

Coast Die Casting Co.
Cold Metal Products
Cook Heat Treating, Inc.
Cox Photo Service
Crucible Steel Co. of America
Container Corp. of America
Cincinnati Gas & Electric Co.
Cincinnati & Suburban Bell Telephone Co.
California Mfg. Association
Darnell Corporation
Die Cast Products, Inc.
Daily Grinding Co.
Degen-Fiege Co.
Deutsch Co.
Dister Printing Co.
Drake Steel Co.
Ducommun Metals and Supply
Dunning Iron Store
Reuben H. Donnelley Corp.
Electro Castings Co.
Electric Equipment Co.
Empire Tool Co.
Fondron Dust Cloth & Wiping Rag Co.
Francis F. Folaron
F & F Sheet Metal Co.
Ferrell Electric Co.
Fibreboard Products, Inc. [28]
Fowler Kenworthy Electric Co.
Franklin Plastics
Fullerton Mfg. Co.
Fafnir Bearing Co.
Garden Supply Merchandiser

Gates Rubber Co.
Goodyear Tire & Rubber Co.
Golden State Advertising Co.
Hardware News
Honorbilt, Inc.
Hardware Age
Hamilton Sign Co.
Julius Herman Corp.
Ideal Hardware Co.
International Harvester Co.
Indus Corporation
Johnson Aluminum Co.
Justice Co.
Kensco, Inc.
K & L Pattern Co.
Kirkhill Rubber Co.
K.D.K. Products Co.
Kwikset Lock, Inc.
Kleen Towel Service Co.
Erwin Lamps
Layton Rentals
Les Stark Florist
O. D. Lewis
Link Belt Co.
Lyon & Lyon
Lyon Metal Products, Inc.
Martha's Fountain Grill
Miller-Barnes Oil Co.
Machinists Tool & Supply [29]
Maltby Co.
Mantz Co.
Meyer Sheet Metal Co.

Micro Precision Co.
J. W. Minder Chain Co.
Musto Keenan Co.
Ben Miller, Inc.
North American Van Lines
Nice Ball Bearing Co.
National Sanitary Supply
New Departure
Nu Chem Products
National Carloading Corp.
Oscar & Associates, Inc.
Orange County Printing Co.
Overton Foundry
Pacific Telephone & Telegraph Co.
Pacific File Co.
Park Adding Machine Co.
Peck Steel & Die Supply
Phoenix Castor Co., Inc.
Pitney Bowes
Pacific Ports
Rawlins Bros.
Rempel Lumber & Bldg. Material Co.
Hotel Sherman
Southern Calif. Edison Co.
Stor-Dor Forwarding Co.
Southern Calif. Gas Co.
R. R. Shackelford
Signode Steel Strapping Co.
Shepherd Tractor [30]
Smith & Williams
Shultz Steel Co.
Southern Bolt Co.

So. Gate Rubber Stamp
Standard Oil Co.
S.K.F. Industries, Inc.
Savage Auto Supply
J. J. Stephensen
Strauss Dec. & Exp. Co., Inc.
Standard Oil Co.
Timken Roller Bearing Co.
Torrington Co.
Tubesales
Times-Mirror Co.
Transport Clearings
Union Oil of California
Underwood Corporation
Van Z Office Supply
Universal Carloading & Dist. Co.
Wales Strippit Corp.
Western Metal Co.
Woods General Tire Co.
Western Gear Works
Wilson's Motor Freight
Richard L. Wheelwright
Western Union Telegraph Co.
Ziegler Steel Service
Ziegler Hardware Co.
Zenith Die Cast Co.
Zenith Screw Products [31]

XXVIII.

Interrogatory XXVIII:

Has

(a) King O'Lawn Manufacturing Company

(b) King O'Lawn, Inc.

at any period since November 25, 1952, been operated by an assignee?

Answer to Interrogatory XVIII:

(a) Yes.

(b) No.

XXIX.

Interrogatory XXIX:

If the answer to Interrogatories 28(a) or 28(b) is in the affirmative, what is the name and address of said assignee, and what are the dates between which assignee acted in an operating capacity?

Answer to Interrogatory XXIX:

The assignee of King O'Lawn Manufacturing Company is: Credit Managers Association of Southern California, M. W. Engleman, 1501 West Eighth Street, Los Angeles 17, California.

The assignee has been operating the King O'Lawn Manufacturing Company since February 2, 1955, and is still operating the business as of this date, December 8, 1955.

XXX.

Interrogatory XXX:

What portion of King O'Lawn Manufacturing Company is owned by

(b) Leonard Faas

(c) Walter Faas

(d) Rudolph Faas? [32]

Answer to Interrogatory XXX:

(a) Louis D. Faas, 25%

(b) Leonard Faas, 25%

(c) Walter Faas, None

(d) Rudolph Faas, None

The foregoing answers are made without prejudice to modification or correction should any error be found or additional information obtained.

/s/ LOUIS FAAS,

/s/ LEONARD FAAS.

KING O'LAWN MFG. CO.,

By /s/ LOUIS D. FAAS,

Partner;

/s/ LEONARD FAAS,

Partner.

State of California,

County of Los Angeles—ss.

Subscribed and sworn to before me this 10th day of December, 1955.

[Seal] /s/ KARAWAY KENTON,

Notary Public in and for the County and State
Above Named.

My commission expires Aug. 24, 1956. [33]

General Assignment

This Assignment, made this 1st day of February, 1955, by Louis D. Faas, Bernice H. Faas, Leonard A. Faas and Genevieve E. Faas, a Co-Partnership dba King O'Lawn Manufacturing Co., South Gate, parties of the first part, hereinafter referred to as assignor, to M. W. Engleman of Los Angeles, California, party of the second part, hereinafter referred to as assignee.

Witnesseth: That said assignor, for and in consideration of the covenants and agreements to be performed by the party of the second part, as hereinafter contained, and of the sum of One Dollar (\$1.00) to assignor in hand paid by said assignee, receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, assign, convey and transfer unto said assignee, his successors and assigns, in trust, for the benefit of assignor's creditors generally, all of the property of the assignor of every kind and nature and wheresoever situated, both real and personal, and any interest or equity therein not exempt from execution, including all that certain stock of merchandise, store furniture and fixtures, book accounts, books, bills receivable, cash on hand, choses in action, insurance policies, and all other personal property of every kind and nature situated in or pertaining to that store and now owned and conducted by said assignor, at 5216 Chakemco Street, in the City of South Gate, County of Los Angeles, State of California, except leases and leasehold interests in real estate. Said assignee

is to receive the said property, conduct the said business, should he deem it proper, and is hereby authorized at any time after the signing hereof by the assignor to sell and dispose of the said property upon such time and terms as he may see fit, and is to pay creditors of the first party pro rata, according to the several indebtedness due to them from the said assignor, the net proceeds arising from the conducting of said business and sale and disposal of said property after deducting all moneys which said assignee may at his option pay for the discharge of any lien on any of said property and any indebtedness which under the law is entitled to priority of payment, and all expenses, including a reasonable fee to assignee and his attorney and to attorney for assignor.

Said assignee is also authorized and empowered to transfer and assign any or all of said property to the Los Angeles Wholesalers' Board of Trade, a Corp., for the purposes and upon the terms and conditions set forth herein, and said assignee is authorized and empowered to appoint such agents, adjusters and/or attorneys as he may deem necessary, and such agents, adjusters and/or attorneys shall have full power and authority to open bank accounts in the name of the assignee and to deposit assigned assets or the proceeds thereof in such bank accounts and to draw checks thereon and with the further power and authority to do such other acts and to execute such papers and documents in con-

nection with this assignment as said assignee may consider necessary or advisable.

In Witness Whereof, the said parties have hereunto set their hands the day and year first above written.

LOUIS D. FAAS,
BERNICE H. FAAS,
LEONARD A. FAAS,
GENEVIEVE E. FAAS,

A Co-Partnership d.b.a. King O'Lawn Manufacturing Company.

/s/ LEONARD A. FAAS,
/s/ LOUIS D. FAAS,
/s/ GENEVIEVE E. FAAS,
/s/ BERNICE H. FAAS,
/s/ W. M. ENGLEMAN.

[Endorsed]: Filed December 12, 1955. [34]

[Title of District Court and Cause.]

DEFENDANT'S REPLY TO PLAINTIFF'S
REQUEST FOR ADMISSION OF FACTS

Defendants admit the truth of each of the factual statements in Plaintiff's Request for Admission of Facts, except that in Statements 9 and 10 the rotatable cutter cannot enter an area which is too small

to accommodate the engine-supporting base of the device. [40]

/s/ LOUIS D. FAAS,

/s/ LEONARD FAAS,

KING O'LAWN MFG. CO.,

By /s/ LOUIS D. FAAS,

Partner;

/s/ LEONARD FAAS,

Partner.

State of California,
County of Los Angeles—ss.

Subscribed and sworn to before me this 10th day
of December, 1955.

[Seal] /s/ KARAWAY KENTON,
Notary Public in and for the County and State
Above Named.

My commission expires Aug. 24, 1956.

[Endorsed]: Filed December 12, 1955. [41]

[Title of District Court and Cause.]

PLAINTIFF'S SECOND INTERROGATORIES

To Lyon & Lyon, 811 West Seventh Street, Los
Angeles 17, California, Attorneys for Defend-
ants:

The plaintiff requests that each of the defendants
named above answer under oath in accordance with

Rule 33 of the Federal Rules of Civil Procedure, the following interrogatories:

1. Will defendants contend at the trial that any one of the claims in patent No. 2,618,919 describe the apparatus shown [43] in patent No. 2,719,398?

2. If the answer to Interrogatory No. 1 is in the affirmative, which claim or claims do defendants so contend?

3. Will defendants contend at the trial that positioning of the trimmer blade 10 and cutter 19 relative to the ground surface by use of handle 29, as shown in patent No. 2,618,919, is

(a) described in the specification

(b) claimed

in patent No. 2,618,919?

4. Will defendants contend at the trial that side members 1 and 2, shown in Figure 1 of patent No. 2,618,919, are

(a) shown

(b) described in the specification

(c) claimed

in patent No. 2,719,398?

5. Will defendants contend at the trial that any one of the claims in patent No. 2,618,919 describe the lawn trimmer

(a) shown in the drawings

(b) described in the specification

of patent No. 2,719,398?

6. If the answer to Interrogatory No. 5(a) and/or No. 5(b) is in the affirmative, which of said claims so describes said lawn trimmer?

7. Will defendants contend at the trial that the filing date of the application from which patent No. 2,719,398 matured, does not relate back to June 16, 1950?

8. Will defendants contend at the trial that patent application Serial No. 419,196, that matured into patent No. 2,719,398 is not a Continuation of patent application Serial No. 168,506?

9. Will defendants contend at the trial that any one of the claims in patent No. 2,719,398 is invalid for double patenting in view of patent No. 2,618,919? [44]

10. If the answer to Interrogatory No. 9 is in the affirmative, which claim or claims will defendants contend to be so invalid?

Dated: December 14, 1955.

WILLIAM C. BABCOCK,

FREDERICK E. MUELLER,

By /s/ WILLIAM C. BABCOCK,
Attorneys for Plaintiff.

[Endorsed]: Filed December 16, 1955. [45]

[Title of District Court and Cause.]

DEFENDANTS' REPLY TO PLAINTIFF'S
SECOND REQUEST FOR ADMISSION OF
FACTS

Defendants admit the truth of each of the factual statements in Plaintiff's Second Request for Admission of Facts, except as follows:

Statement No. 7.

"That patent No. 2,618,919 describes the positioning of cutter 19 relative to the ground surface solely by pivotal movement of adjusting lever 13."

The statement is untrue because patent 2,618,919 contains the following description at column 3, lines 46-55:

"In the operation of my apparatus, when it is desired to trim the edges of the lawn along a sidewalk or a flower bed or any other thing, the right [47] hand arm may be lowered and put in adjusted position so that as the machine is held in the desired position by the handle, the teeth of the vertical edger blade 19 will extend to the desired distance relative to the surface of the turf or ground or walk." (Emphasis added.)

Statement No. 13.

"That Claim 15 of patent No. 2,618,919 does not describe the lawn trimmer

- (a) shown in the drawings
- (b) described in the specification of patent No. 2,719,398."

The statement and both parts thereof are untrue because Claim 15 of Patent No. 2,618,919 does describe the lawn trimmer (a) shown in the drawings and (b) described in the specification of patent No. 2,719,398.

/s/ LOUIS D. FAAS,

/s/ LEONARD A. FAAS.

KING O'LAWN MANUFACTURING CO.,

By /s/ LOUIS D. FAAS,
Partner;

/s/ LEONARD A. FAAS,
Partner.

Subscribed and sworn to before me this 27th day of December, 1955.

[Seal] /s/ LOUISE HARRISON,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires November 3, 1958.

[Endorsed]: Filed December 27, 1955. [48]

[Title of District Court and Cause.]

SECOND AMENDED COMPLAINT FOR IN-
FRINGEMENT OF UNITED STATES LET-
TERS PATENT No. 2,719,398

Plaintiff complains of defendants, and for cause of action alleges:

I.

This action arises under the patent laws of the United States, more particulrly 35 U.S.C. Sec. 271, 281, as hereinafter more fully appears. Jurisdiction is conferred in this Court by 28 U.S.C. Sec. 1338.

II.

King O'Lawn Manufacturing Co. is a partnership comprised of Louis D. Faas, Bernice H. Faas, Leonard A. Faas, and Genevieve E. Faas, co-partners, and has a regular and established place of [55] business in Los Angeles County in the Southern Judicial District of California.

III.

Defendants Walter Faas and Rudolph Faas reside and have regular and established places of business in Los Angeles County in the Southern Judicial District of California.

IV.

Defendant M. W. Engleman, Assignee for Benefit of Creditors for Defendant King O'Lawn Manufacturing Co., has a regular and established place of business in Los Angeles County in the Southern Judicial District of California, and since February

2, 1955, to the present date has operated and managed said company.

V.

King O'Lawn, Inc., is a corporation, and has a regular and established place of business in Los Angeles County in the Southern Judicial District of California.

VI.

On October 4, 1955, United States Letters Patent No. 2,719,398 were duly and legally issued to plaintiff for an invention in a Lawn Trimmer; and since that date plaintiff has been and still is the owner of said patent No. 2,719,398.

VII.

The defendants and each of them have been and still are infringing said patent No. 2,719,398 by making, selling and using lawn trimming and edging apparatus embodying the patented invention and will continue to do so unless enjoined by this Court.

VIII.

The defendants and each of them have conspired to wilfully and intentionally infringe said Letters Patent, and pursuant to such wrongful design they have jointly and severally infringed said Letters Patent and rendered them valueless. [56]

IX.

Plaintiff has placed the required statutory notice on all lawn trimming and edging apparatus manufactured and sold by him and under license from

him under said Letters Patent and has given written notice to defendants of their said infringements.

Wherefore, plaintiff demands a preliminary and final injunction against further infringement by defendants, and each of them, and those controlled by defendants; an accounting for profits and damages; and an assignment of costs against defendants.

WILLIAM C. BABCOCK,

FREDERICK E. MUELLER,

By /s/ WILLIAM C. BABCOCK,

Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

Filed nunc pro tunc December 28, 1955, W.
Mathes, Judge. [57]

[Title of District Court and Cause.]

STIPULATION AND DISMISSAL AS TO
PATENT No. 2,618,919

Subject to the approval of the Court, it is stipulated by and between counsel for parties in the above-entitled action, as follows:

(1) A full size operating machine as shown in the Boggs Patent No. 2,538,250 was in existence and in public use in Dallas, Texas, on December 29, 1947. The construction of that machine is further shown in copies of drawings dated 6/19/47 and attached hereto as exhibit "A." The cutter head 38 was fixed

on the round shaft 36, and the latter was slidably received within tubular arm 34 and held in adjusted position by means of the set screw 37. The supporting wheels 11 were at least eight inches in diameter.

(2) The Knight Patent No. 2,274,902, granted March 3, 1942, [50] shall be considered with the same force and effect as though it has been set out in the Answer to Amended Complaint, filed in this cause on November 10, 1955.

(3) On or about August 10, 1948, plaintiff sold a full size operating machine to the City of Huntington Park, California, and that machine was used publicly by city employees during the year 1948. The machine was known as the "Duo Lawn Edger" and was constructed in conformity with the drawings of the Hutchens Patent No. 2,618,919 and was identical in all material respects to the machine referred to as defendants' Exhibit "Y" in the deposition of plaintiff Ralph O. Hutchens taken in Los Angeles, California, beginning on November 30, 1955. The attached photographs identified as exhibits "B" and "C" show the machine so designated as Exhibit "Y" in said deposition.

(4) This action is dismissed with prejudice as to the Hutchens Patent No. 2,618,919.

(5) Claims 6, 7, 8, 9, 10, 15 and 16 of Patent No. 2,719,398 are the only claims relied upon by plaintiff in this action.

(6) The effective filing date of the Hutchens Patent No. 2,719,398 is June 16, 1950.

(7) Defendants will produce at the trial one of the accused devices and also the "Duo Lawn Edger" referred to as defendants Exhibit "Y" in said deposition of Ralph O. Hutchens.

(8) Title to the Hutchens Patent No. 2,719,398 resides in plaintiff.

Dated: This 22nd day of December, 1955.

LYON & LYON,
Attorneys for Defendants.

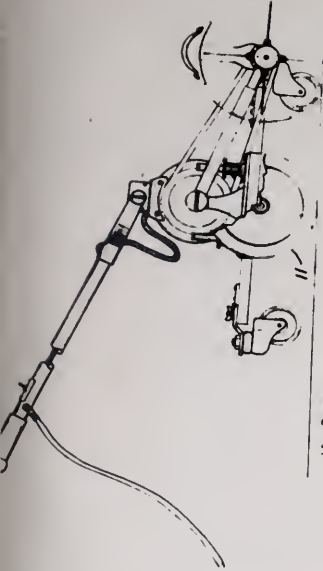
By /s/ JOHN B. YOUNG.

WILLIAM C. BABCOCK,
FREDERICK E. MUELLER,
Attorneys for Plaintiff.

By /s/ WILLIAM C. BABCOCK.

It is so ordered this 28th day of December, 1955.

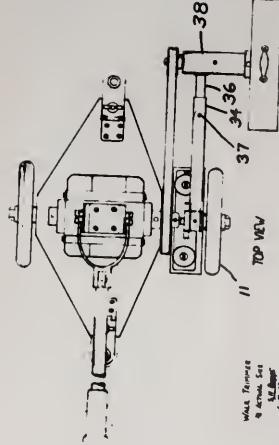
/s/ WILLIAM C. MATHES,
Judge, U. S. District Court.



WHEEL THROTTLE
- 10 ACROSS SIZE
- 10 ACROSS
- 10 ACROSS

CUTTING SIDE VIEW

WHEEL THROTTLE
- 10 ACROSS SIZE
- 10 ACROSS
- 10 ACROSS



WHEEL THROTTLE
- 10 ACROSS SIZE
- 10 ACROSS
- 10 ACROSS

TOP VIEW

WHEEL THROTTLE
- 10 ACROSS SIZE
- 10 ACROSS
- 10 ACROSS

6

EXHIBIT "A"

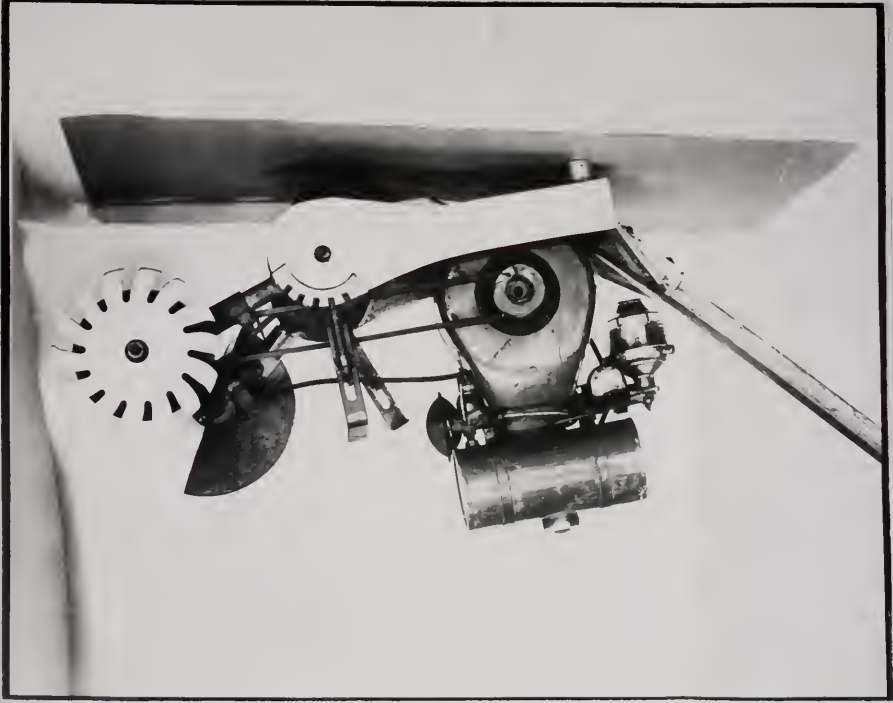
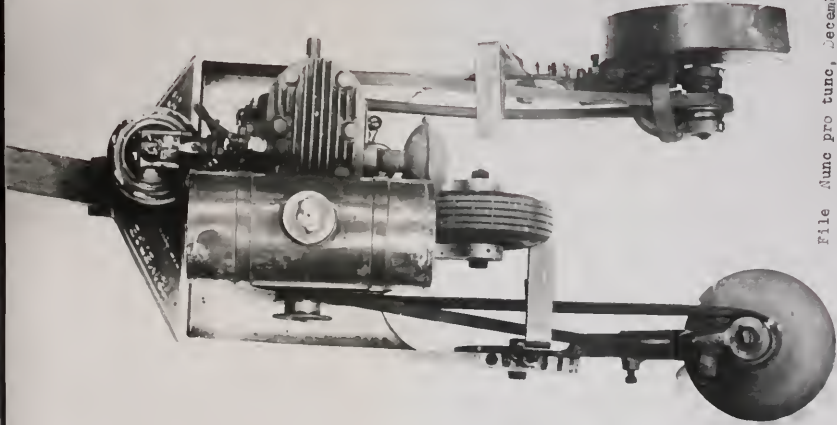


EXHIBIT "B"



File Nunc pro tunc, December 28, 1955
Mathea, Judge.

Endorsed: Filed January 3, 1956.

EXHIBIT "C"

54

[Title of District Court and Cause.]

ANSWER TO SECOND AMENDED
COMPLAINT

Come Now the defendants, by their attorneys,
Lyon & Lyon, and answering the amended com-
plaint herein, allege:

I.

Answering Paragraph I of the second amended
complaint, defendants admit the allegations thereof.

II.

Answering Paragraph II of the second amended
complaint, defendants admit the allegations thereof.

III.

Answering Paragraph III of the second amended
complaint, [59] defendants admit the allegations
thereof.

IV.

Answering Paragraph IV of the second amended
complaint, defendants admit the allegations thereof.

V.

Answering Paragraph V of the second amended
complaint, defendants admit the allegations thereof.

VI.

Answering Paragraph VI of the second amended
complaint, defendants admit that on October 4,
1955, the United States Letters Patent No. 2,-
719,398 were issued to Ralph O. Hutchens for a

Lawn Trimmer but defendants deny that said Letters Patent were duly or legally issued for an invention. Defendants admit that plaintiff has been and still is the owner of said Patent Number 2,719,398.

VII.

Answering Paragraph VII of the second amended complaint, defendants deny each and all of the allegations of said Paragraph 7.

VIII.

Answering Paragraph VIII of the second amended complaint, defendants deny each and all of the allegations of said Paragraph 8.

IX.

Answering Paragraph IX of said second amended complaint, defendants are without sufficient knowledge to form a belief as to the truth of the allegations of Paragraph IX except that defendants acknowledge receipt of written notice of infringement from plaintiff.

As Separate and Additional Defenses, Defendants Allege:

X.

That said Letters Patent No. 2,719,398 and each and every claim thereof, are invalid and void as not involving invention nor [60] patentable subject matter, because in view of the common public knowledge disclosed by the state of the art prior to the pretended inventions of the alleged inventor,

it did not require nor involve invention to produce the purported inventions of said Letters Patent, but on the contrary, involved merely mechanical skill and such ordinary adaptation and utilization of well-known matter as was within the common knowledge and ability of any person possessing ordinary skill and knowledge of that art and closely related arts.

XI.

That said Letters Patent No. 2,719,398, and each and every claim thereof, are invalid and void as not involving novelty nor involving invention nor patentable subject matter in view of the art prior to the date of the alleged invention of said Letters Patent; that said Letters Patent lacked novelty and required no invention to produce the alleged inventions and that the alleged inventions did not differ in any patentable respect from what was before said alleged inventions, or more than the respective statutory periods prior to the effective filing dates of the applications for said Letters Patent, invented and constructed, known or used in this country or described in patents and printed publications, enumerated as follows:

United States Letters Patent

No.	Inventory	Date
827,548—	Martin.....	July 31, 1906.
2,274,902—	Knight.....	March 3, 1942.
2,354,095—	Adams.....	July 18, 1944.
2,435,192—	Arsneau.....	February 3, 1948.

2,439,607—Irwin.....	April 13, 1948.
2,524,466—Moss et al.....	October 3, 1950.
2,538,230—Boggs	January 16, 1951.
2,597,017—McKinstry.....	May 20, 1952.

XII.

That none of the claims in the said Letters Patent No. 2,719,398, are infringed by defendants because the alleged patentee is estopped and forever precluded from contending for a broad interpretation of the claims thereof such as would include or subordinate any device made, used or sold by defendants, because broad claims were cancelled and admitted in response to rejections made by the Patent Office and narrower claims accepted, and because of the arguments made to obtain allowances of claims in the applications for said Letters Patent.

XIII.

That said Letters Patent No. 2,719,398, and each and every claim thereof are invalid and void because the alleged invention does not comprise a new and patentable combination of elements, but constitutes a mere aggregation of old elements producing no new result nor effect.

XIV.

That defendants allege that all of the claims of said Letters Patent No. 2,719,398 are invalid because the alleged invention purportedly described and claimed in said claims were merely the result of the exercise of the ordinary facilities of reasoning

aided by the special knowledge and facility of manipulation which is acquired through the habitual and intelligent practice of the art and is not the result of that inventive faculty which is the purpose of the Constitution and Patent Laws to encourage and reward, and involving nothing more than the exercise of mere mechanical skill in view of the state of the art as known at the time of, and long prior to, the alleged inventions thereof by the applicant for said Letters Patent, said state of the art including the prior patents referred to in Paragraph XI.

XV.

Defendants allege that while the applications for said [62] Letters Patent, No. 2,719,398, were pending in the United States Patent Office, the applicant therefor so limited and confined the claims of said applications that plaintiff cannot now seek nor obtain a construction of any of the claims of said Letters Patent No. 2,719,398 sufficiently broad to cover any devices made, used or sold by defendants.

XVI.

Defendants further allege that Letters Patent No. 2,719,398 are invalid and void for double patenting and that the elements of the combination claimed in said Letters Patent are substantially the same elements claimed in Letters Patent No. 2,618,919.

XVII.

Defendants further allege that said Letters Patent No. 2,719,398 are invalid because the alleged

invention purportedly defined by the claims thereof were known to or used by others in the United States prior to the alleged invention by applicant therefor, including defendants herein, and including those inventors named in the prior patents and the assignees named in said prior patent set forth in Paragraph XI hereof.

XVIII.

Defendants further allege that said Letters Patent No. 2,719,398 are invalid and void because the alleged invention purportedly defined by the claims thereof had been on sale and in public use in the United States for more than one year prior to June 16, 1950, the effective filing date of the application resulting in Letters Patent No. 2,719,398, and that said alleged invention was known to be on sale and in public use prior to June 16, 1950, by each of the following persons:

Sam H. Boggs, Dallas, Texas;

Louis D. Fass, Defendant herein;

Ralph O. Hutchens, Plaintiff herein. [63]

XIX.

Plaintiff has committed acts of unfair competition in sending notices of patent infringement to defendants' customers and distributors charging infringement of Patents Nos. 2,618,919 and 2,719,398 without cause and with intent to damage defendants' business.

Wherefore, defendants pray:

1. That Letters Patent No. 2,719,398 and each of the claims thereof be declared invalid and of no force and effect;

2. That defendants be declared not to infringe the aforesaid Letters Patent, and each of the claims thereof;

3. That all costs, including reasonable attorneys' fees and other taxable items, be taxed against plaintiff; and

4. That defendants have such other, further and different relief as to this Court may be just and equitable.

Dated at Los Angeles, California, this 29th day of December, 1955.

LYON & LYON,
LLOYD SPENCER,
JOHN B. YOUNG,

By /s/ JOHN B. YOUNG,
Attorneys for Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 29, 1955. [64]

[Title of District Court and Cause.]

PLAINTIFF'S MOTION FOR NEW TRIAL
RULE 59(a)

Plaintiff moves the Court to set aside the proposed Findings of Fact, Conclusions of Law and Judgment, and to grant plaintiff a new trial on the grounds that:

1. The Court erred in ruling that the claims at issue in the patent in suit, particularly Claim 16, was not infringed, when defendants by their answers to plaintiff's Interrogatories and Request for Admission of Facts which were admitted as evidence into the case without objection, as well as the testimony of Louis D. Fass, admitted such infringement.

2. The Court erred in ruling that the device of the patent in suit must be limited to a very narrow range of equivalents.

3. The Court erred in ruling that Claim 16 of the patent in suit when read literally is not infringed by devices manufactured or sold by defendants since October 4, 1955. [66]

4. The Court erred in ruling that Claim 16 of the patent in suit when read literally describes the device disclosed in the Hutchens patent No. 2,618,919.

5. The Court erred in ruling that Claim 16 of the patent in suit, if read broadly enough to describe the accused device, also describes the device shown.

described and claimed in the Hutchens patent No. 2,618,919.

6. The judgment is contrary to law in that the evidence in the case does not support same.

WILLIAM C. BABCOCK,

FREDERICK E. MUELLER,

By /s/ WILLIAM C. BABCOCK. [67]

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR NEW TRIAL

1. Defendants by their response dated December 10, 1955, to plaintiff's First Request for Admission of Facts filed December 2, 1955, and particularly those responses to Requests Nos. 3, 4, 5, 6, 7, 8 and 11, have admitted that devices embodying the structure as defined in Claim 16 of the patent in suit have been manufactured and sold since October 4, 1955, the issue date of said patent. The Court's judgment of no infringement of Claim 16 is directly contra to facts that have been admitted by defendants, and which are not in issue.

2. The Court's ruling that the device of the patent in suit must be limited to a very narrow range of equivalents is believed erroneous, particularly in view of the fact that defendants were unable to provide any anticipation of the structure of the device as defined in Claim 16 of the patent in suit, or a prior device embodying only the elements

defined in Claim 16 that could be used for either lawn trimming or lawn edging operations. The claims at issue define a device which fills a long-felt need for a power-driven lawn edger and trimmer, and one which those skilled in the art were not, prior to the plaintiff, able to provide. The prior art may be crowded as the Court suggests, but it is crowded with impractical and unworkable devices that cannot be used in the simple manner of plaintiff's device or having the structure thereof.

Just such a situation prevailed in *Stearns vs. Tinker & Rasor*, 104 U.S.P.Q. 234, 240 (CCA 9, 1955) wherein the Court stated,

“We have here, then, a patent for an improvement which fills a long-felt need, which those schooled in the art had not been able to devise before the patentee, and which meets with acceptance in the market. When these indicia of invention are taken into account [68] together with the true state of the prior art and what Stearns actually did to improve the art, it must be concluded that the Stearns patent is not invalid for want of invention. *Expanded Metal Co. v. Bradford*, 214 U.S. 366, 381; *Eibel Process Co. v. Minnesota & Ontario Paper Co.*, 261, U.S. 45, 56; *Johnson Company, Inc., v. Philad Co.*, 9 Cir., 96 F.2d 442, 444, 37 USPQ 570, 572-573; *Research Products Co. v. Tretolite Co.*, 9 Cir. 106 F.2d 530, 532, 43 USPQ 99, 100-101; *Tyra v. Adler*, 8 Cir., 85 F.2d 548, 552, 31 USPQ 1, 4-5; *Ideal Roller & Mfg. Co.*

v. Sutherland Paper Co., 6 Cir., 96 F.2d 675, 677, 38 USPQ 101, 103-104.”

3. Each and every element defined in Claim 16 of the patent in suit is found in the illustrations of Exhibit A, attached to plaintiff's First Request for Admission of Facts filed December 2, 1955, which Requests and responses thereto were introduced into the case as evidence without objection from defendants.

4. For Claim 16 of the patent in suit to describe the device disclosed in the Hutchens patent No. 2,618,919, the plain language of said Claim 16 would have to be distorted to read that “a base” as set forth therein, is the equivalent of—a frame B preferably of metal comprising a base with side members 1 and 2 * * * The side members 1 and 2 of the frame extend forwardly of the base and have racks 4 and 23.1 united to or formed integral therewith at their forward ends (lines 44-46, column 1 and lines 4-6, column 2 of the Hutchens patent No. 2,618,919). The drawings, specification and claims of the patent in suit do not even suggest the interpretation the Court proposes to give Claim 16 thereof.

5. The device disclosed in the Hutchens patent No. 2,618,919 requires as essential elements [69] thereof.

a. Side members 1 and 2 that extend forwardly from a base;

b. Racks 4 and 23.1 united to or formed integral with said side members at their forward ends;

c. Levers 12 and 13;

d. Plates 21 and 22 that pivotally support said levers from the forward end portions of said side members.

These elements are essential in the operation of the Hutchens device disclosed in patent No. 2,618,919, irrespective of whether the cutters thereof are used concurrently in edging and trimming, or whether one of the cutters is used individually for edging or trimming.

The elements tabulated above are not used in the Hutchens device in the patent in suit or in defendants' Junior, Gardener, Special or Senior Model, and would not serve any useful purpose if included as a part thereof. Therefore, Claim 16 of the patent in suit, if read literally, describes the Hutchens device as described and illustrated in the patent in suit, as well as defendants' Junior, Gardener, Special and Senior Models, but does not describe the device shown and described in the Hutchens patent No. 2,618,919.

6. The judgment is contrary to the law and not supported by the evidence for the reasons above set forth.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 25, 1956. [70]

In the District Court of the United States, Southern
District of California, Central Division

Civil Action No. 18564-WM

RALPH O. HUTCHENS,

Plaintiff,

vs.

LOUIS D. FAAS; BERNICE H. FAAS, LEON-
ARD A. FAAS; GENEVIEVE E. FAAS; Co-
Partners Doing Business as KING O'LAWN
MANUFACTURING CO.; WALTER FAAS;
RUDOLPH FAAS; M. W. ENGLEMAN, As-
signee for Benefit of Creditors for KING
O'LAWN MANUFACTURING CO.; KING
O'LAWN, INC., a California Corporation,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This cause having come on for trial before the Court on Tuesday, January 3, 1956, witnesses for both parties having been heard, documentary and physical exhibits having been offered and received in evidence, counsel for both parties having been heard and the Court being fully advised in the premises hereby makes the following Findings of Fact and Conclusions of Law and Judgment:

Findings of Fact

I.

This is an action for infringement of United States Letters Patent No. 2,719,398 issued on

October 4, 1955, to the plaintiff, Ralph O. [72] Hutchens.

II.

Plaintiff Ralph O. Hutchens is the sole owner of the entire right, title and interest in and to said United States Letters Patent No. 2,719,398.

III.

This Court has jurisdiction of the parties and the subject matter of the action.

IV.

The original complaint filed August 16, 1952, alleged infringement of Patent No. 2,618,919 granted November 25, 1952. The amended complaint filed October 21, 1955, alleged infringement of said patent No. 2,618,919 and added a new patent No. 2,719,398. The action was dismissed with prejudice as to the said patent No. 2,618,919 by stipulation dated December 22, 1955. The second amended complaint was filed on or about December 22, 1955, and the answer thereto was filed on December 29, 1955.

V.

Defendant King O'Lawn Manufacturing Co. is a co-partnership composed of defendants Louis D. Faas; Bernice H. Faas; Leonard A. Faas and Genevieve E. Faas, as co-partners, and has a place of business in the City of South Gate, State of California, within the Southern District of California, Central Division.

VI.

Defendant M. W. Engleman is Assignee for Benefit of Creditors for said King O'Lawn Manufacturing Co. Defendants Walter Faas and Rudolph Faas reside in Los Angeles County, State of California, within the Southern District of California, Central Division.

VII.

King O'Lawn, Inc., is a California Corporation having a place of business at Los Angeles, California. [73]

VIII.

The claims in issue are Claims 6, 7, 8, 9, 10, 15 and 16 of said Patent No. 2,719,398.

IX.

On or about August 10, 1948, plaintiff sold a full size operating machine to the City of Huntington Park, California, and that machine was used publicly by city employees during the year 1948, and more than one year prior to the effective filing date of said patent No. 2,719,398. The machine was known as the "Duo Lawn Edger" and was constructed in conformity with the drawings of patent No. 2,-618,989. A precise and faithful example of that machine was received in evidence as defendants' Exhibit "B."

X.

A full size operating machine as shown in the Boggs patent No. 2,538,250 was in existence and in public use in Dallas, Texas, on December 29, 1947, and more than one year prior to the effective filing

date of said patent No. 2,719,398. The construction of that machine is further shown in copies of drawings dated 6/19/47, and received in evidence as part of defendants' Exhibit "A."

XI.

The accused device as exemplified by defendants' Exhibit "E" employs three wheels for supporting the frame of the machine. Two rear wheels are mounted to rotate about a common axis and the third front wheel is mounted on an arm pivoted to the frame. The frame may be raised and lowered with respect to the front wheel by means of a lever system connected to the arm. A sleeve fixed on the frame telescopically receives a longitudinal rod and the forward end of the rod carries a housing. Bearings in the [74] housing support a transverse shaft carrying a cutter blade and a driven pulley. The pulley is belt driven from an engine on the frame. The rod, housing, shaft, cutter blade and driven pulley can be turned about the rod axis so that the cutter blade can operate vertically or horizontally or at inclined positions, as required. Friction clamp means are provided to maintain the rod in the desired angular position.

XII.

The invention of the said Patent No. 2,719,398 lies in a very crowded art and therefore the claims in issue must be limited to a very narrow range of equivalents.

XIII.

Claims 6, 7, 8, 9, 10 and 15 in issue require

“* * * wheel means that movably support said engine support and permit angular adjustment thereof relative to a surface on which said wheel means rests, a handle extending upwardly and rearwardly from said engine support that permits guidance and angular adjustment thereof relative to the ground surface, * * *”

Claim 16 in issue requires

“* * * wheel means that movably support said base for angular adjustment thereof relative to the surface on which said wheel means rests, a handle extending upwardly and rearwardly from said base for guiding same; * * *” [75]

Defendants' accused devices employ an arm pivoted on the frame for supporting the front wheel.

Conclusions of Law

I.

Plaintiff Ralph O. Hutchens is the owner of all of the right, title and interest in and to said Patent No. 2,719,398.

II.

This Court has jurisdiction of the subject matter and of the parties to the action.

III.

Defendants have neither severally nor jointly infringed Claims 6, 7, 8, 9, 10, 15 and 16 in issue as

charged by the plaintiff. Said claims cannot be interpreted broadly enough to be infringed by the accused devices without also causing them to read on the prior art machine, defendants Exhibit "B."

Judgment

In accordance with the foregoing findings and conclusions, it is ordered, adjudged and decreed:

I.

That this Court has jurisdiction of the subject matter and of the parties to the action.

II.

That plaintiff Ralph O. Hutchens is the owner of the entire right, title and interest in and to Letters Patent No. 2,719,398 granted October 4, 1955, together with all rights of action for infringement thereof.

III.

That defendants have neither severally nor jointly infringed said Letters Patent No. 2,719,398 and particularly Claims 6, 7, 8, 9, 10, 15 and 16 in issue.

IV.

That the issue of validity of said Letters Patent No. 2,719,398 as raised by the pleadings and the evidence has not [76] been determined by this Court in view of its holding upon the issue of infringement.

V.

That the action is hereby dismissed with defendants having judgment for their costs of action, taxed at \$308.59.

Dated: This 30th day of January, 1956.

/s/ WILLIAM C. MATHES,
Judge.

Approved as to form.

.....,
Attorneys for Plaintiff.

LYON & LYON,

/s/ JOHN B. YOUNG,
Attorneys for Defendants.

Affidavit of Service by Mail attached.

Lodged January 10, 1956.

[Endorsed]: Filed January 30, 1956.

Docketed and entered January 31, 1956. [77]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Ralph O. Hutchens, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from

the judgment entered in this action on the 30th day of January, 1956.

Dated: This 29th day of February, 1956, at Long Beach, California.

WILLIAM C. BABCOCK,

FREDERICK E. MUELLER,

By /s/ WILLIAM C. BABCOCK,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 1, 1956. [79]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 94, inclusive, contain the original:

Request for Admission of Facts;
Plaintiff's Interrogatories to Defendants;
Defendants' Answers to Plaintiff's Interrogatories;

Defendants' Reply to Plaintiff's Request for Admission of Facts;

Plaintiff's Second Interrogatories;

Defendants' Reply to Plaintiff's Second Request for Admission of Facts;

Stipulation and Dismissal as to Patent No. 2,618,919;

Second Amended Complaint (as to Infringement of Letters Patent 2,719,398;

Answer to Second Amended Complaint;

Plaintiff's Motion for New Trial;

Findings of Fact, Conclusions of Law & Judgment;

Notice of Appeal;

Statement of Points on Appeal;

Designation of Contents of Record on Appeal;

Substitution of Attorneys;

Designation of Additional Contents of Record on Appeal;

Stipulation & Order Thereon Extending Time to Docket Record on Appeal.

which, together with certified copy of file wrapper and contents of United States Letters Patent No. 2,618,919, to Ralph O. Hutchens and a Certified copy of file wrapper and contents of United States Letters Patent No. 2,719,398, to Ralph O. Hutchens and the following physical exhibits: Full-sized machine made in accordance with the specification and claims of Hutchens Patent No. 2,618,919, Full-sized machine made in accordance with the specification and claims of Hutchens Patent No. 2,719,398, full-scale model of machine made in accordance with the specification and claims of Boggs

Patent No. 2,538,250, and drawing identified as Exhibit A in the "Stipulation and Dismissal as to Patent No. 2,618,919" that forms a part of the record, and a model of the accused device, all in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above case.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of the said District Court this 26th day of April, 1956.

JOHN A. CHILDRESS,
Clerk.

/s/ CHARLES E. JONES,
Deputy.

In the United States Court of Appeals
for the Ninth Circuit

No. 15115

RALPH O. HUTCHENS,

Appellant,

vs.

LOUIS D. FAAS; BERNICE H. FAAS; LEON-
ARD A. FAAS; GENEVIEVE E. FAAS, Co-
Partners Doing Business as KING O'LAWN
MANUFACTURING CO.; WALTER FAAS;
RUDOLPH FAAS; M. W. ENGLEMAN, As-
signee for Benefit of Creditors for KING
O'LAWN MANUFACTURING CO.; KING
O'LAWN, INC., a California Corporation,

Appellees.

APPELLANT'S STATEMENT OF POINTS

Point I.

The Court erred in not finding that the appellees had jointly and severally infringed Claims 6, 7, 8, 9, 10, 15 and 16 of Patent No. 2,719,398.

Point II.

The Court erred in finding that Claims 6, 7, 8, 9, 10, 15 and 16 of said patent could not be interpreted broadly enough to be infringed by the accused device without also causing them to read on the prior art machine, appellees' Exhibit B.

Point III.

The Court erred in finding that the claims at issue must be limited to a very narrow range of equivalents.

Point IV.

The Court erred in finding that appellees' accused devices employ an arm pivoted on the frame for supporting the front wheel, and hence the "wheel means" per se of the accused devices do not permit angular adjustment of the engine support.

Point V.

The Court erred in finding that the handle embodied in the accused devices does not permit angular adjustment of the engine support, and that such adjustment is accomplished by means of the wheel arm and lever system.

Point VI.

The Court erred in considering the machine, appellees' Exhibit B, a prior art machine, for the patent application disclosing and claiming same was filed by appellant and was copending in the United States Patent Office together with his patent application from which the patent issued on which this action is based.

Point VII.

The Court erred in finding no infringement of the claims at issue, when such infringement had

been admitted by appellees in evidence introduced at the trial by appellant without objection by appellees.

Point VIII.

Judgment should be reversed with appropriate instructions for judgment for appellant for an accounting of profits and for damages.

Dated: This 3rd day of May, 1956.

Respectfully submitted,

/s/ WILLIAM C. BABCOCK,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 4, 1956.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF RECORD

Appellant designates, as the portions of the record upon which he will rely and which he desires printed, the following:

1. Second Amended Complaint.
2. Stipulation and Dismissal as to Patent No. 2,618,919.
3. Answer to Second Amended Complaint.
4. Plaintiff's First Interrogatories to Defendants dated December 1, 1955.

5. Defendants' Answer to Plaintiff's Interrogatories dated December 10, 1955.

6. Plaintiff's Request for Admission of Facts dated December 2, 1955.

7. Defendants' Reply to Plaintiff's Request for Admission of Facts dated December 10, 1955.

8. Plaintiff's Second Interrogatories to Defendants dated December 14, 1955.

9. Defendants' Reply to Plaintiff's Second Request for Admission of Facts.

10. Plaintiff's Motion for New Trial—Rule 50(a).

11. Memorandum in Support of Plaintiff's Motion for New Trial.

12. Findings of Fact, Conclusions of Law, and Judgment.

13. Substitute Notice of Appeal.

14. This Designation.

15. Certified copy of file wrapper and contents of United States Letters Patent No. 2,618,919, to Ralph O. Hutchens.

16. Certified copy of file wrapper and contents of United States Letters Patent No. 2,719,398, to Ralph O. Hutchens.

17. Full-sized machine made in accordance with the specification and claims of Hutchens Patent No. 2,618,919.

18. Full-sized machine made in accordance with the specification and claims of Hutchens Patent No. 2,719,398.

19. Full-scale model of machine made in ac-

cordance with the specification and claims of Boggs Patent No. 2,538,250, and drawing identified as Exhibit A in the "Stipulation and Dismissal as to Patent No. 2,618,919" that forms a part of the record.

20. Model of the accused device.

Dated: This 3rd day of May, 1956.

Respectfully submitted,

/s/ WILLIAM C. BABCOCK,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 4, 1956.

[Title of Court of Appeals and Cause.]

APPELLEES' DESIGNATION OF RECORD

Appellees designate, as the portion of the record upon which they will rely, the following:

1. Defendants' Exhibit B, a physical exhibit. This full-size machine, known as the "Duo Lawn Edger" is referred to in Item 3 of Stipulation and Dismissal as to patent No. 2,618,919, constituting a part of the pleadings herein. This full size machine is at present in custody of appellees. It is appellees' belief that this is the machine referred to in Item 17 of "Appellant's Designation of Record" filed in this Court on or about May 4, 1956.

2. Defendants' Exhibit C, a physical exhibit. This set of charts shows the manner of applying the claims of Hutchens patent No. 2,719,398 in suit to the Duo Lawn Edger, defendants' Exhibit B.

3. Defendants' Exhibit E, a physical exhibit. This is a full size exemplar of the accused device, now in custody of appellees. It is appellees' belief that this is the machine referred to in Item 20 of "Appellant's Designation of Record" filed in this Court on or about May 4, 1956.

4. Defendants' Exhibit H, a physical exhibit. This group of charts relates to the patent claims in suit and to the prior art.

5. Defendants' Exhibit N, a physical exhibit. This is a book of the Prior Art Patents listed in Answer to Second Amended Complaint.

6. Plaintiff's Exhibit 1a, a physical exhibit. This is a group of references cited in file of Hutchens patent 2,719,398, in suit.

7. Plaintiff's Exhibit 2, copy of Hutchens patent No. 2,719,398, in suit.

8. Plaintiff's Exhibit 3, copy of Hutchens patent No. 2,618,919.

9. Plaintiff's Exhibit 4, a physical exhibit. This is a full size machine corresponding to Hutchens patent 2,719,398, in suit. This machine is in custody of appellant. It is appellees' belief that this is the same machine referred to in Item 18 of "Appellant's Designation of Record" filed on or about May 4, 1956.

10. This designation.

Dated this 9th day of May, 1956.

Respectfully submitted,

LYON & LYON,

JOHN B. YOUNG,

By /s/ JOHN B. YOUNG,

Attorneys for Appellees.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 10, 1956.

[Title of Court of Appeals and Cause.]

STIPULATION

It is hereby stipulated by and between the parties through their respective counsel that the two Hutchens patents No. 2,719,398 and No. 2,618,919 shall comprise a book of exhibits of which twelve (12) appropriate copies shall be made for use of the Court and counsel.

Dated: May 23, 1956.

LYON & LYON,

Attorneys for Appellees.

Dated: May 24, 1956.

WILLIAM C. BABCOCK,

/s/ WILLIAM C. BABCOCK,

Attorney for Appellant.

[Endorsed]: Filed May 28, 1956.

[Endorsed]: No. 15115. United States Court of Appeals for the Ninth Circuit. Ralph O. Hutchens, Appellant, vs. Louis B. Faas, Leonard Faas, Walter Faas, Rudolph Faas, Individually and as Partners, Doing Business as King O'Lawn Mfg. Co., and King O'Lawn Mfg. Co., a Corporation, Appellees. Transcript of Record. Appeal From the United States District Court for the Southern District of California, Central Division.

Filed: April 27, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

No. 15115

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RALPH O. HUTCHENS,

Appellant,

vs.

LOUIS D. FAAS; BERNICE H. FAAS; LEONARD A. FAAS;
GENEVIEVE E. FAAS; Co-partners doing business as
KING O'LAWN MANUFACTURING Co.; WALTER FAAS;
RUDOLPH FAAS; M. W. ENGLEMAN, Assignee for
Benefit of Creditors for KING O'LAWN MANUFACTUR-
ING Co.; KING O'LAWN, INC., a California Corpora-
tion,

Appellees.

BRIEF FOR APPELLANT.

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Attorney for Appellant.

FILED

JUL 30 1956

PAUL M. O'BRIEN, CLERK

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Benefit of Creditors for KING O'LAWN MANUFACTUR-
ING Co.; KING O'LAWN, INC., a California Corpora-
tion,

Appellees.

BRIEF FOR APPELLANT.

I.

Jurisdictional Statement.

This is an appeal in the above-entitled action for in-
fringement of United States Letters Patent No.
2,719,398.

The District Court of the United States for the
Southern District of California, Central Division, had
jurisdiction under 28 U. S. C. 1338(a) and 1400(b).
A final decision having now been entered in said District
Court, this Court of Appeals has jurisdiction under 28
U. S. C. 1291.

II.

Statement of the Case.

This infringement action involves the infringement of a patent granted to plaintiff-appellant, No. 2,719,398 [Tr. pp. 85-89], relating to a device that could be used to either trim or edge a lawn. Plaintiff had previously been granted a patent, No. 2,618,919 [Tr. pp. 80-84], not in suit, pertaining to a device that embodied two cutters which could be concurrently used for edging and trimming grass, or if desired, both cutters could be set to simultaneously edge or trim grass. The two above-mentioned patents were co-pending as applications in the Patent Office from June 16, 1950 to November 25, 1952.

Although not in suit, Patent No. 2,618,919 is very important as a model of the invention described therein was manufactured and publicly used on August 10, 1948, which date was more than one year prior to June 16, 1950, the filing date of the application on which said patent in suit was granted. The defendants contended, and the Trial Court concluded that this prior use of the '919 device so limited the scope of the claims at issue that they were not infringed by the accused device. [Tr. pp. 67-68.]

The device disclosed in the '919 patent includes an engine-supporting frame B from which two members 1 and 2 extend forwardly to rigidly support two racks 4 and 23.1 and pivotally support two plates 21 and 22 from which levers 12 and 13 projected upwardly for actuating purposes. Frame B remains in a horizontal position and is movably supported by any desired number of wheels 3. Two arm structures are rigidly affixed to plates 21 and 22, and can be independent-

ly pivoted upwardly or downwardly to dispose cutters 10 and 19 in the desired relationship relative to the ground surface. Said arm structures so support cutters 10 and 19 that each cutter can be vertically or horizontally disposed, or adjusted to a position therebetween. A handle 29 extends upwardly and rearwardly from frame B to guide same.

After inventing the above-described device and filing a patent application thereon, plaintiff found as a result of further experimental work, that a much simpler machine could be provided which, while not permitting concurrent lawn edging and trimming, did allow either edging or trimming thereof by means of suitable adjustment of the single power-driven cutter associated with the machine, as shown in Transcript, page 85. After inventing the second combined lawn edging or trimming device, plaintiff file a patent application thereon, on which the patent in suit was granted.

The device disclosed and claimed in the patent in suit includes a base that is angularly adjustable relative to the ground surface and supported by wheel means which make such adjustment possible. A single arm structure is provided, which when the invention is in an operative condition, projects forwardly from one side of the base and adjustably supports a cutter that can be disposed in either a vertical position for edging, a horizontal position for trimming, or a position intermediate the horizontal and vertical. Angular adjustment of the base relative to the ground surface to likewise control the distance of the cutter therefrom is accomplished by movement of a handle that extends upwardly and rearwardly from the base.

The accused devices of which Defendants' Exhibit "E" is typical, are identical to the structure disclosed in the patent in suit, with the exception that the base is movably supported on three wheels, one of which wheels by a lever arrangement is vertically movable relative to the base to permit angular adjustment of the base relative to the ground surface as vertical movement of said wheel occurs.

Although the side members extending forwardly from the engine-supporting frame B, the racks 4 and 23.1, levers 12 and 13, plates 21 and 22 were essential elements in the combination disclosed and claimed in plaintiff's first patent, and were not included as elements in his second patent disclosure, the defendants contended, and the Trial Court concluded, that in view of the public use of plaintiff's first invention, the claims at issue could not be interpreted broadly enough to be infringed by the accused devices.

Final judgment was entered on January 30, 1956 [Tr. pp. 68-69] holding that the claims at issue were not infringed by the accused devices. On February 29, 1956, a Notice of Appeal [Tr. pp. 69-70] was filed by plaintiff.

III.

The Questions Involved.

1. Arguments Raised Below.

The defenses below to the obvious infringement of Claims 6, 7, 8, 9, 10, 15 and 16 of appellant's Patent No. 2,719,398 were:

- (a) the invention of said Patent No. 2,719,398 lies in a very crowded art, and therefore the claims at issue must be limited to a very narrow range of equivalents;

- (b) the claims at issue cannot be interpreted broadly enough to read on devices admittedly manufactured and sold by appellees since the date of issuance of said patent, for to do so would cause the claims to read on Plaintiff's Exhibit "B";
- (c) that Plaintiff's Exhibit "B" is a combined lawn edger and trimmer made in accordance with the disclosure in plaintiff's Patent No. 2,618,919 which was publicly sold and used on and after August 10, 1948, which is more than one year prior to June 16, 1950, the filing date of the application on which Patent No. 2,719,398 was granted;
- (d) the scope of the claims at issue must be limited due to the device disclosed in appellant's prior Patent No. 2,618,919.

2. The Decision Below.

The District Court held:

- (a) that defendants have neither severally nor jointly infringed said Patent No. 2,719,398 and particularly Claims 6, 7, 8, 9, 10, 15 and 16 at issue;
- (b) that the issue of validity of said Letters Patent No. 2,719,398 as raised by the pleading and evidence has not been determined by this Court in view of its holding upon the issue of infringement.

IV.

Specifications of Error.

The Court below committed the following error in its Conclusions of Law:

1. Conclusion of Law III is erroneous in stating that defendants have neither severally nor jointly infringed Claims 6, 7, 8, 9, 10, 15 and 16 at issue as charged by the plaintiff. Said claims cannot be interpreted broadly enough to be infringed by the accused devices without also causing them to read on the prior art machine, Defendants' Exhibit "B."

The Court below committed the following additional errors:

1. The Court's judgment is contrary to and not supported by the evidence in the case in that

(a) The Court erred in not finding that the defendants had jointly and severally infringed Claims 6, 7, 8, 9, 10, 15 and 16 of Patent No. 2,719,398.

(b) The Court erred in finding that the claims at issue must be limited to a very narrow range of equivalents.

(c) The Court erred in finding that defendants' accused devices employ an arm pivoted on the frame for supporting the front wheel, and hence the "wheel means" *per se* of the accused devices do not permit angular adjustment of the engine support.

(d) The Court erred in finding that the handle embodied in the accused devices does not permit angular adjustment of the engine support, and that such adjustment is accomplished by means of the wheel arm and lever system.

(e) The Court erred in considering the machine, Defendants' Exhibit "B," a prior art machine, for the patent application disclosing and claiming same was filed by plaintiff and was co-pending in the United States Patent Office with his patent application on which the patent in suit was granted.

(f) The Court erred in finding no infringement of the claims at issue, when such infringement had been admitted by defendants in evidence introduced at the trial by appellant without objection by appellees.

The Court below committed the following additional error:

1. Failed to grant judgment in favor of plaintiff for royalties and damages

(a) as to all of the infringing devices manufactured and sold by defendants since the date of issuance of Patent No. 2,719,398.

V.

Summary of Argument.

It will be shown that:

1. Defendants admit that plaintiff is the owner of United States Letters Patent No. 2,719,398 and has been the owner thereof since October 4, 1955, the date of issue thereof.

2. Defendants have since October 4, 1955, manufactured and sold accused devices which are described by the claims at issue.

3. Defendants have admitted by answers to Interrogatories and responses to Request for Admission of Facts that accused devices have been manufactured and sold since October 4, 1955, that infringe at least Claim 16 of United States Letters Patent No. 2,719,398.

4. The Trial Court erroneously found that the invention defined in Patent No. 2,719,398 lies in a very crowded art and therefore the claims at issue must be limited to a very narrow range of equivalents.

5. The Findings of Fact, Conclusions of Law and Judgment of the Trial Court are not supported by the evidence.

6. The Judgment of the Trial Court should be reversed.

VI.

The Statutory Provisions.

The following provisions from the Patent Act of July 10, 1952 (Public Law 593, 82nd Cong., 2d Sess., Ch. 950; 66 Stat. 792):

The Enacting Clause

An Act

To revise and codify the laws relating to patents and the Patent Office, and to enact into law title 35 of the United States Code entitled "Patents."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 35 of the United States Code, entitled "Patents," is revised, codified, and enacted into law, and may be cited, "Title 35, United States Code, section" as follows:

35 U. S. C., Sec. 100. Definitions.

When used in this title unless the context otherwise indicates—

- (a) The term "invention" means invention or discovery.

- (b) The term “process” means process, art or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material.

* * * * *

35 U. S. C., Sec. 101. Inventions patentable.

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

35 U. S. C., Sec. 102. Conditions for patentability; novelty and loss of right to patent.

A person shall be entitled to a patent unless—

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or onsale in this country, more than one year prior to the date of the application for patent in the United States, or

(c) he has abandoned the invention, or

(d) the invention was first patented or caused to be patented by the applicant or his legal representatives or assigns in a foreign country prior to the date of the application filed more than twelve months before the filing of the application in the United States, or

(e) the invention was described in a patent granted on an application for patent by another filed in the United

States before the invention thereof by the applicant for patent, or

(f) he did not himself invent the subject matter sought to be patented, or

(g) before the applicant's invention thereof the invention was made in this country by another who had not abandoned, suppressed, or concealed it. In determining priority of invention there shall be considered not only the respective dates of conception and reduction to practice of the invention, but also the reasonable diligence of one who was first to conceive and last to reduce the practice, from a time prior to conception by the other.

35 U. S. C., Sec. 103. Conditions for patentability; non-obvious subject matter.

A patent may not be obtained though the invention is not identically disclosed or described as set forth in Section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

35 U. S. C., Sec. 271. Infringement of patent.

(a) Except as otherwise provided in this title, whoever without authority makes, uses or sells any patented invention, within the United States during patented invention, within the United States during the term of the patent therefor, infringes the patent.

(b) Whoever actively induces infringement of a patent shall be liable as an infringer.

(c) Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial non-infringing use, shall be liable as a contributory infringer.

(d) No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following: (1) derived revenue from acts which if performed by another without his consent would constitute contributory infringement of the patent; (2) licensed or authorized another to perform acts which if performed without his consent would constitute contributory infringement of the patent; (3) licensed or authorized another to perform acts which if performed without his consent would constitute contributory infringement of the patent; (4) sought to enforce his patents rights against infringement or contributory infringement.

* * * * *

35 U. S. C., Sec. 282. Presumption of validity; defenses.

A patent shall be presumed valid. The burden of establishing invalidity of a patent shall rest on a party asserting it.

POINT ONE.

Defendants Admit That Plaintiff Is the Owner of United States Letters Patent No. 2,719,398 and Has Been the Owner Thereof Since October 4, 1955, the Date of Issue Thereof.

Defendants did not challenge plaintiff's ownership to Patent No. 2,719,398 and have specifically conceded this in their answer to Paragraph VI of plaintiff's second amended complaint [Tr. pp. 51-52].

POINT TWO.

Defendants Have Since October 4, 1955, Manufactured and Sold Accused Devices Which Are Described by the Claims at Issue.

For convenience of discussion Claim 16 has been reproduced herein, and the elements therein recited separately, which elements are individually identified by the letters A to K, inclusive.

16. A device for use in so supporting a rotatable cutter that it can be driven in any one of a plurality of positions between the vertical and horizontal and at the desired elevation above the ground in lawn trimming and edging operations, including:

A. a base;

B. wheel means that movable support said base for angular adjustment thereof relative to the surface on which said wheel means rests;

C. a handle extending upwardly and rearwardly from said base for guiding same;

D. a prime mover mounted on said base;

E. a driving pulley that is rotated by said prime mover in a fixed position;

F. a shaft on which said cutter is mounted;

G. a bearing in which said shaft is rotably supported;

H. a driven pulley rigidly affixed to said shaft:

I. an elongate rigid member normally disposed to said shaft when said shaft is disposed to said bearing, which member is rigidly affixed to said bearing;

J. a belt extending between said driving and driven pulleys;

K. and mounting means positioned on one side of said base that adjustably support said first member for longitudinal and rotatable movement, which mounting means so supports said member that said belt is in vertical alignment with at least a portion of said driven and driving pulleys when said member is so disposed as to support said cutter in either a horizontal or vertical position.

The Trial Court found and defendants admit in Finding of Fact XI [Tr. p. 66] that the accused device includes the following elements in combination, which elements for comparison with those in Claim 16 are identified by the same letters used in identifying the elements of that claim but to which a prime has been affixed.

A' "frame of the machine."

B' ". . . three wheels for supporting the frame of the machine. Two rear wheels are mounted to rotate about a common axis and the third front wheel is mounted on an arm pivoted to the frame. The frame may be raised and low-

ered with respect to the front wheel by means of a lever system connected to the arm.”

C’ The handle is not mentioned specifically as an element in Finding of Fact XI. In answer to Request for Admission No. 6 [Tr. pp. 5 and 37-38] defendants admit the use of such a handle in the structure of the accused device.

D’ “an engine on the frame.”

E’, F’, “Bearings in the housing support a transverse
G’, H’, shaft carrying a cutter blade and a driven pulley.

J’ The pulley is belt driven from an engine on the frame. The rod, housing, shaft, cutter blade and driven pulley can be turned about the rod axis so that the cutter blade can operate vertically or horizontally, or at inclined positions as required.”

I’ “a longitudinal rod and the forward end of the rod carries a housing.”

K’ “A sleeve fixed on the frame telescopically receives a longitudinal rod and the forward end of the rod carries a housing. . . . Friction clamp means are provided to maintain the rod in the desired angular position.”

From the above comparative analysis it will be seen that while the defendants have chosen to use different terminology than employed by plaintiff in describing the accused device, yet each and every element found in Claim 16 is also found in the accused device.

POINT THREE.

Defendants Have Admitted by Answers to Interrogatories and Responses to Request for Admission of Facts That Accused Devices Have Been Manufactured and Sold Since October 4, 1955, That Infringe at Least Claim 16 of United States Letters Patent No. 2,719,398.

Plaintiff's Request for Admission of Facts [Tr. pp. 3-7] and defendants' reply thereto [Tr. pp. 37-38] were admitted at the trial as evidence without opposition.

Defendants, in reply to Request Nos. 3 and 4 [Tr. pp. 37-38] admitted that lawn trimmers and edgers identified as Junior, Gardener, Special and Senior Models have been manufactured and sold by defendants since October 4, 1955.

Defendants' replies to Request for Admission of Facts Nos. 5, 6, 7, 8 and 11 [Tr. pp. 5-7, and 37-38] admit that all of the elements A-K, inclusive, of Claim 16 as set forth under Point II were present in said Junior, Gardener, Special and Senior Models which were manufactured and sold by defendants since October 4, 1955. This admission on the part of defendants is further supported by Exhibit "A" attached to plaintiff's Request for Admission of Facts [Tr. pp. 3-15] which shows that the accused devices embodied element by element the structure set forth in Claim 16—without recourse to equivalents. Each of the elements set forth in Claim 16 will also be found present in Defendants' Exhibit "E," a physical exhibit which is a full-size exemplar of the accused device.

POINT FOUR.

The Trial Court Erroneously Found That the Invention Defined in Patent No. 2,719,398 Lies in a Very Crowded Art and Therefore the Claims at Issue Must Be Limited to a Very Narrow Range of Equivalents.

The Trial Court in its Conclusions of Law held that the claims at issue cannot be interpreted broadly enough to be infringed by the accused device without also causing them to read on the machine, Defendants' Exhibit "B."

The device disclosed in the Hutchens Patent No. 2,618,919 requires as essential elements thereof:

- (a) Side members 1 and 2 that extend forwardly from a base;
- (b) Racks 4 and 23.1 united to or formed integral with said side members at their forward ends;
- (c) Levers 12 and 13;
- (d) Plates 21 and 22 that pivotally support said levers from the forward end portions of said side members.

These elements are essential in the operation of the Hutchens device disclosed in Patent No. 2,618,919, irrespective of whether the cutters thereof are used concurrently in edging and trimming, or whether one of the cutters is used individually for edging or trimming.

These elements tabulated above are not used in the Hutchens device disclosed in the patent in suit, or in defendants' Junior, Gardener, Special or Senior Model, and would not serve any useful purpose if included as a part thereof. Therefore, Claim 16 of the patent in suit, if read literally, defines the Hutchens device as de-

scribed and illustrated in the patent in suit, as well as defendants' Junior, Gardener, Special and Senior Models, but does not describe the device shown and described in the Hutchens Patent No. 2,618,919.

Defendants also contended that the claims at issue describe the invention defined in the Boggs Patent No. 2,538,250. The Boggs patent described and claimed a device as shown [Tr. p. 52] that movably supported a power driven hub in such a position that a number of vertically disposed wires pivotally affixed to the hub could rotate in a vertical plane to edge grass, and there was no description in the patent of a device that could be used either for the edging or trimming of grass as defined by the claims at issue, particularly Claim 16. Further, the Boggs patent was considered as a reference by the Patent Office during the prosecution of the application on which Patent No. 2,719,398 was granted, and considered that the claims at issue do not describe the Boggs device and defined an improvement in the art that amounted to invention over the Boggs device.

In defense of their infringement defendants relied on a number of prior art patents pertaining to such non-analogous fields as the art of logging and timbering equipment. The prior art may be crowded as the Trial Court suggests, but it is crowded with impractical and unworkable devices that cannot be used in the simple manner of plaintiff's invention as defined in the claims at issue. If the prior art is to be crowded as suggested by the Trial Court it must be by including devices taken from non-analogous fields, which devices have no bearing on the patentable novelty of plaintiff's invention as defined in the claims at issue, which are strictly limited to the art of lawn edging and trimming equipment.

POINT FIVE.

The Findings of Fact, Conclusions of Law and Judgment of the Trial Court Are Not Supported by the Evidence.

The claims at issue were allowed without amendment by the Patent Office, and with the R. H. Boggs Patent No. 2,538,230 having been cited as a reference. Boggs as a reference was the closest cited by the Patent Office, and is of particular importance in that it is taken from the same field of the art as plaintiff's invention, namely, lawn trimming and edging equipment.

The prior patents cited by defendants in their answer [Tr. pp. 53-54] all pertain to the art of logging and timbering devices, and are clearly taken from a non-analogous field of the art to that of lawn trimming and edging equipment.

The Trial Court failed to realize that the patentable novelty of plaintiff's invention as defined in the claims in suit resides in the assembly of a minimum number of old elements into a novel combination that permits the user of the invention to either edge or trim grass, and to at all times control the depth of the edging or height of the trimming by simply varying the angular position of the engine-supporting base relative to the ground surface. Plaintiff's invention as described and claimed in Patent No. 2,618,919 could also trim and edge a lawn, but only by means of a combination of elements that included forwardly extending members, racks, levers and plates which form no part of plaintiff's second form of invention as defined in the claims at issue. The forwardly extending members, racks, levers and plates would serve absolutely no useful function if included as a part

of the combination of elements defined in the claims in suit, but would be mere surplusage.

Therefore, the Trial Court was in error in restricting the scope of the claims at issue [Tr. pp. 67-68] on a device that is structurally different from the first form of the invention, and operates in a completely different manner.

This very question was presented to this Court in *Ry-Lock Co. Ltd. v. Sears, Roebuck & Co.* (C. C. A. 9), 107 U. S. P. Q. 292 at 294-295, in which it was stated:

“This invention, made up by combination of elements, in a manner which was sufficiently new and novel to measure up to the accepted standards of invention, was not, in the language of *Himes v. Chadwick*, 9 Cir., 199 F. 2d 100, 95 U. S. P. Q. 59, 63, ‘a mere aggregation of a number of old parts.’ Hence a finding which, as here, picks out one element in one prior patent and another element in another prior patent as a demonstration of anticipation, is manifestly insufficient to overcome the presumption arising from the issuance of the patent, a presumption reemphasized by the existing Act. 35 U. S. C. A. 282.

* * * * *

“This lever tension arm in the accused device is more flimsy and would appear to be more difficult to assemble than that of *Ry-Lock*, but it produces ‘substantially the same result in substantially the same way’ and infringement results. *Royal Typewriter Co. v. Remington Rand*, 2 Cir., 168 F. 2d 691, 692, 77 U. S. P. Q. 517, 518.”

This decision is applicable in the present instance where defendants only departed from the structure of plaintiff’s

invention by angularly supporting the base by means of a wheel and lever, rather than a pivotally supporting wheel.

Also, in *Stearns v. Tinker & Rasor* (C. C. A. 9), 104 U. S. P. Q. 234, 239, this Court stated:

“The rule laid down by many of the authorities is that whether arts or uses are analogous depends upon the similarity of their elements and purposes. It is said that if the elements and purposes in one art are related and similar to those in another art and because and by reason of that relation and similarity make an appeal to the mind of a person having mechanical skill and knowledge of the purposes of the other art, then such arts must be said to be analogous; and, if the converse is true, they are non-analogous arts. *A. J. Deer Co., Inc. v. U. S. Slicing Machine Co.*, 7 Cir., 21 F. 2d 812, 813; *Copeman Laboratories Co. v. General Plastics Corp.*, 7 Cir., 149 F. 2d 962, 65 U. S. P. Q. 550; *Allied Wheel Products v. Rude*, 6 Cir., 206 F. 2d 752, 755, 97 U. S. P. Q. 510, 512-513; 69 C. J. S., Sec. 53, p. 266. Even if we assume here a relation and similarity of elements in holiday detectors and snap-switches, the purpose of the snap-switch art, *i.e.*, to open and close an electric circuit, has no relation or similarity to the purpose of the art of holiday detection, *i.e.*, to determine the condition of pipe coating by subjecting it to electrical inspection.”

In view of the above decisions the Trial Court was clearly in error to restrict the scope of the claims in suit to the extent of holding that the accused devices do not infringe same.

POINT SIX.

The Judgment of the Trial Court Should Be Reversed.

The Judgment of the Trial Court should be reversed as to infringement, and the case remanded to the Trial Court for trial on the validity of the claims at issue.

Respectfully submitted,

WILLIAM C. BABCOCK,

Attorney for Appellant.

No. 15115.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RALPH O. HUTCHENS,

Appellant,

vs.

LOUIS D. FAAS, BERNICE H. FAAS, LEONARD A. FAAS,
GENEVIEVE E. FAAS, Co-partners doing business as
KING O'LAWN MANUFACTURING Co.; WALTER FAAS,
RUDOLPH FAAS, M. W. ENGLEMAN, Assignee for Bene-
fit of Creditors for KING O'LAWN MANUFACTURING
Co., KING O'LAWN, INC., a California Corporation,

Appellees.

APPELLEES' BRIEF.

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FILED

AUG 24 1956

PAUL P. O'BRIEN, CLERK

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Co., KING O'LAWN, INC., a California Corporation,
Appellees.

APPELLEE'S BRIEF.

This is an appeal from the judgment of the District Court (Mathes, D. J.) dismissing plaintiff-appellant's complaint for infringement of United States Letters Patent No. 2,719,398.

The District Court's jurisdiction is based upon the patent laws of the United States, as alleged in the Second Amended Complaint and admitted in the Answer thereto, and more specifically upon 28 U. S. C., Sec. 1338(a). Title 28 U. S. C., Sec. 1291, gives this Court jurisdiction of this appeal.

Statement of the Case.

A. The Nature of the Controversy.

This is a suit for infringement of Letters Patent No. 2,719,398, granted October 4, 1955, to plaintiff-appellant, for "Lawn Trimmer."

B. The Parties.

Plaintiff-appellant is an individual, the patentee named in the patent in suit.

Defendants-appellees Louis D. Faas and Leonard A. Faas are brothers, and together with their wives, Bernice H. Faas and Genevieve E. Faas, respectively, are co-partners doing business as King O'Lawn Manufacturing Co. Walter Faas and Rudolph Faas are brothers of Louis D. Faas and Leonard A. Faas. At the time of the trial, M. W. Engleman was assignee for benefit of creditors for King O'Lawn Manufacturing Co. [Tr. 35, 65] but a reassignment to Louis D. Faas, Bernice H. Faas, Leonard A. Faas and Genevieve E. Faas was made subsequent to entry of Judgment in this cause on January 30, 1956. King O'Lawn, Inc., is a California corporation but has no assets nor liabilities and is completely inactive [Tr. 65].

C. The Pleadings.

The original complaint filed August 16, 1955, related only to an earlier patent No. 2,618,919. An amended complaint filed October 21, 1955, added a new patent, No. 2,719,398. The action was dismissed with prejudice as to the first patent No. 2,618,919 by Stipulation entered

December 28, 1955 [Tr. 46], and the Second Amended Complaint [Tr. 43] relating only to the patent No. 2,719,398 was filed concurrently with the Stipulation.

In the Stipulation of December 28, 1955 [Tr. 46], plaintiff admitted the sale and public use in the United States of a machine as shown in the first patent No. 2,618,919 during the year 1948, *i.e.*, more than one year prior to the effective filing date (June 16, 1950) of the patent in suit, No. 2,719,398.

D. Disposition of the Case by the Court.

After a trial upon the merits, the District Court held that the claims of the patent in suit are not infringed and cannot be interpreted broadly enough to be infringed by the accused devices without also causing them to read on plaintiff's prior art machine described in the Stipulation of December 28, 1955 [Tr. 67, 68]. The District Court did not rule on the issue of validity of the patent in suit, in view of its holding of non-infringement [Tr. 68].

E. The Subject Matter of the Patent in Suit.

The patent discloses a lawn trimmer and edger driven by a small gasoline engine. The device is not used to mow a lawn, but only to trim the edges. *A single supporting wheel is used.* This enables the operator to grasp the handle to tilt the machine either fore and aft or from side to side, or in any other direction about the central supporting wheel. A cutting blade is belt-driven from the engine and this blade may be operated vertically or horizontally or at inclined positions.

Summary of Argument.

I.

The claims at issue in the patent in suit read squarely on plaintiff's 1948 prior art machine described in the Stipulation of December 28, 1955.

II.

The claims in issue in the patent in suit cannot be interpreted broadly enough to be infringed by the accused devices without also causing them to read on the prior art machines set out in said Stipulation.

III.

Plaintiff's 1948 machine described in the said Stipulation is prior art, with respect to the patent in suit.

IV.

The accused devices do not infringe any claim in the patent in suit and defendants have not admitted infringement.

V.

If the Court of Appeals should reverse the District Court's Judgment of non-infringement, the Court of Appeals should not remand the case for a determination of the issue of validity, but should rule on this issue directly, because the evidence of invalidity is physical and documentary in form and is before the Court of Appeals for consideration.

ARGUMENT.

Point I.

The claims at issue in the patent in suit read squarely on Plaintiff's 1948 prior art machine described in the Stipulation entered December 28, 1955. The manner in which each of the claims at issue in the patent in suit read on that prior art machine is shown in detail in Defendant's Physical Exhibit "C" now before this Court. For convenience a copy of the fourth sheet of this exhibit relating to Claim 16 is attached to this brief. Plaintiff's 1948 prior art machine renders the patent in suit totally void, providing that the claims of the patent read on that machine. It is defendants-appellees' contention that all of the claims at issue including Claim 16, relied upon by plaintiff-appellant read squarely and without equivocation upon that machine.

On the issue of prior public use and sale there is no distinction between use or sale by another and by the inventor himself. (*Schmeiser v. Thomasian*, 227 F. 2d 875 (9th Cir., 1955).)

The United States Patent Office had no knowledge prior to issuing the patent in suit of the public sale and use of plaintiff's 1948 machine; the file history of the patent [Pltf. Ex. 1] fails to mention it.

Point II.

The claims in issue in the patent in suit cannot be interpreted broadly enough to be infringed by the accused devices without also causing them to read on plaintiff's

1948 prior art machine. The manner in which the claims at issue in the patent in suit read upon that machine is shown in Defendants' Physical Exhibit "C" now before this Court. The claims at issue also read upon the Boggs device (as distinguished from the Boggs patent) set forth in the same Stipulation and shown on a drawing attached thereto. The claims at issue cannot be read on the accused devices for the reasons pointed out in the Conclusions of Law of the District Court entered January 30, 1956 [Tr. 67]. The claims at issue do not cover the accused devices because the claims require that the "wheel means" itself permit angular adjustment of the base. While this is true of plaintiff's machine having only a single supporting wheel, it is not true of defendants' machines wherein the tilting of the base is accomplished not by the wheels but by a leverage system acting on one of the three wheels.

Point III.

Plaintiff's 1948 machine described in the Stipulation entered December 28, 1955, is prior art with respect to the patent in suit. An erroneous statement appears at the top of page 7 of the Brief for Appellant, as follows:

"(e) The Court erred in considering the machine, Defendants' Exhibit 'B,' a prior art machine, for the patent application disclosing and claiming same was filed by plaintiff and was co-pending in the United States Patent Office with his patent application on which the patent in suit was granted."

Said Exhibit "B" is the 1948 machine of the Stipulation of December 28, 1955, and the Stipulation not only settles the fact that the machine was sold and in public use in

the United States in 1948 but the Stipulation also includes an agreement that the effective filing date of the patent in suit is June 16, 1950. The co-pendency of the earlier patent application resulting in the first patent No. 2,618,919, is therefore absolutely immaterial.

On January 16, 1950, plaintiff Ralph O. Hutchens filed application Serial No. 168,506, and on March 29, 1954, filed a continuation application Serial No. 419,916. The latter application issued on October 4, 1955, as Patent No. 2,719,398, now in suit. Not only was it stipulated that the effective filing date of the patent in suit was June 16, 1950, but a consideration of the new patent law effective January 1, 1953, Sections 101, 102, 112, 120 (see appendix) leads to the inevitable conclusion that the effective filing date of the patent in suit cannot be carried back of June 16, 1950, because the patent does not mention the earlier Hutchens patent No. 2,618,919; under Section 120 of the codified law the filing date of the earlier patent cannot be claimed. Hence, Section 102(b) applies and the patent is invalid if the claims thereof cover a device which was in public use or sale in this country more than one year prior to June 16, 1950.

Point IV.

Defendants have not admitted infringement of any claim of the patent in suit.

It appears that the principal argument presented in the Brief for Appellant is that defendants are alleged to admit infringement at least of Claim 16. This "admission" is alleged to be found in a consideration of the Request for Admission of Facts Nos. 5, 6, 7, 8 and 11 [Tr. 5-7, and 37-38]. Careful examination, however,

shows that no such admission was made. No. 5 asks if the accused devices contain

“an engine-supporting base mounted on wheels which base can be angularly adjusted relative to the surface on which said wheels rest.”

Defendants admitted that the accused devices contain such construction but this is *not* the same as admitting that the accused devices embody the language of the claims. Thus, Claim 16 requires

“wheel means that movably support said base for angular adjustment thereof relative to the surface on which said wheel means rests.”

Defendants admit that the accused structure has a base which can be angularly adjusted, but do *not* admit that the wheel means movably support the base for such adjustment. The adjustment in the accused devices is obtained by a leverage or linkage system and not by the wheel means.

Point V.

If the Court of Appeals should reverse the District Court's judgment of non-infringement, the Court of Appeals should not remand the case for determination of the issue of validity but should rule on this issue directly, because the evidence of invalidity is physical and documentary in form and is before the Court of Appeals for consideration. No oral testimony is involved and therefore the demeanor of witnesses and appraisal of inferences to be drawn from their testimony is not involved here. Since this is an appeal in equity, the whole case is before

the Court of Appeals and it should decide the case, so far as it is in a condition to be decided, upon its merits. (*Waterloo Min. Co. v. Doe et al.* 82 Fed. 45 (C. C. A. 9).) Appeals in equity are heard *de novo* and disposed of finally without requiring that the case be remanded for further trial except in exceptional cases. (*Unkle v. Wills*, 281 Fed. 29, 34 (C. C. A. 8).) In *Edwards v. Lain*, 112 F. 2d 343 (C. C. A. 7, 1940), it was stated:

“In equity, an appeal brings up the whole record and appellate court may review the evidence and make such order or decree as the court of first instance ought to have made, giving proper weight to findings on disputed issues of fact which should be accorded to a tribunal which heard the witnesses.”

In *Ry-Lock Company, Ltd. v. Sears, Roebuck & Co.*, 227 F. 2d 615 (9 Cir., decided Nov. 21, 1955, Cert. Den., 100 L. Ed. Advance P. 353, the District Court held a patent void on the ground of anticipation by earlier patents. However, on appeal this Court reversed the lower court judgment, and said, at page 617:

“We note therefore that the findings of the trial court with respect to anticipation were based solely upon these paper patents unsupported by any testimony of witnesses in open court. It follows that we are in as good a position as was the trial court to consider and evaluate the anticipatory effect of the patents brought forward by Sears.”

This Court then went on to find that the patent was infringed, although no finding on the issue of infringement had been made by the lower court.

In *Martin v. Be-Ge Mfg. Co., et al.*, 232 F. 2d 530 (C. C. A. 9), decided April 19, 1956, Judge Mathes, sitting on the Court of Appeals for the Ninth Circuit said, at page 532:

"The Supreme Court has admonished that even in cases where no infringement appears, it is the 'better practice' to adjudicate also the issue of validity, *Sinclair & Carrol Co. v. Interchemical Corp.*, 1945, 325 U. S. 327, 330, 65 S. Ct. 1143, 89 L. Ed. 1644; but this has been interpreted as 'a mere cautionary admonition to the courts to exercise their discretion whether to pass upon the question of validity, and to strike down clearly invalid patents where it would be in the public interest to do so, even though a finding of non-infringement would dispose of the case.'" (*Kemart Corp. v. Printing Arts Research Laboratories, Inc.*, 201 F. 2d 624, 634 (9 Cir., 1953); see *Harries v. Air King Products*, 183 F. 2d 158, 161-162 (2 Cir., 1950).

"Inasmuch as the patent in suit was issued in 1935 and expired in 1952, 35 U. S. C. §154, there remained no public interest in a determination of the issue of validity. So it was not necessary for the District Court to adjudicate that issue in view of the finding of non-infringement."

In the present case the patent in suit issued October 4, 1955 and hence less than one year of its seventeen-year life has expired at this time. It is submitted that the public interest is best served by striking it down at the outset, if this Court of Appeals finds it to be invalid.

Claims 6-10, 15 and 16 in issue read squarely upon the following prior art not considered by the Patent Office:

- A. Plaintiff's 1948 prior art machine shown and described in the Stipulation of December 28, 1955

[Tr. 46] and shown by Defendants' physical Exhibit "B".

- B. The Boggs machine (as distinguished from the Boggs patent) referred to in the same Stipulation [Tr. 45].
- C. The Knight patent No. 2,274,902 [see Defendant's physical Exhibit "C"].

Conclusion.

The Court of Appeals should sustain the judgment of non-infringement of the District Court. However, if the Court of Appeals should reverse on that point, it should hold the patent to be invalid as unpatentable over the prior art.

Respectfully submitted,

LYON & LYON,

By JOHN B. YOUNG,

Attorneys for Appellees.

APPENDIX.

Section 4 of the Act of July 19, 1952, c. 950, 66 Stat. 815, reads as follows:

“(a) This Act (this title) shall *take effect on January 1, 1953* and shall apply to all applications for patent filed on or after such date and to all patents granted on such applications. It shall apply to further proceedings on applications pending on such date and to patents granted on such applications except as otherwise provided. It shall apply to unexpired patents granted prior to such date except as otherwise provided.” (Emphasis added.)

Pertinent sections of the new codified law, Title 35, United States Code, are set out below:

#101. *Inventions Patentable.*

“Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.”

#102. *Conditions for patentability: novelty and loss of right to patent.*

“*A person shall be entitled to a patent unless—*

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or

(b) *the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States, or * * **” (Emphasis added.)

#112. *Specification.*

“The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention. * * *”

#120. *Benefit of earlier filing date in the United States.*

“An application for patent for an invention disclosed in the manner provided by the first paragraph of section 112 of this title in an application previously filed in the United States by the same inventor shall have the same effect, as to such invention, as though filed on the date of the prior application, if filed before the patenting or abandonment of or termination of proceedings on the first application or on an application similarly entitled to the benefit of the filing date of the first application *and if it contains or is amended to contain a specific reference to the earlier filed application.*” (Emphasis added.)

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Appellees.

APPELLANT'S REPLY BRIEF.

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FILED

SEP 11 1956

PAUL P. O'BRIEN, CLERK

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Appellees.

APPELLANT'S REPLY BRIEF.

Reply to Appellees' Point I.

The defendant appellees' contention that all of the claims at issue, including Claim 16, read squarely and without equivocation upon the machine shown in appellees' physical Exhibit C is clearly erroneous, as may easily be seen from an inspection of Sheet 4 thereof which is included in the appendix of appellees' brief. In appellees' physical Exhibit C, Sheet 4, Claim 16 of appellant's patent No. 2,719,398 has been broken down into the various elements defined therein and in conjunction therewith four photographs of appellees' Exhibit B have been included,

which is a machine made in accordance with the drawings of appellant's patent No. 2,618,919. In this breakdown, Element E is,

“and mounting means positioned on one side of said base that adjustably support said first member for longitudinal and rotatable movement, which mounting means so supports said member that said belt is in vertical alignment with at least a portion of said driven and driving pulleys when said member is so disposed as to support said cutter in either a horizontal or vertical position.”

and an arrow extends therefrom which purports to designate this element and show the location thereof in the photograph of appellees' Exhibit B. It will be apparent, however, from an inspection of said Exhibit B that the element described and the portion of Exhibit B to which the arrow is directed are not one and the same, but are completely different structures. What the arrow actually points to and designates is one of the side members 1 or 2 which are disclosed in Figure 2 of appellant's patent No. 2,618,919 and described in the patent specification in Column 2, lines 4 to 7 thereof as “the side members 1 and 2 of the frame extend forwardly of the base and have racks 4 and 23.1 united to or formed integral therewith at the forward end.” A further inspection of the drawings of patent No. 2,618,919, particularly Figures 1 and 2 thereof, will show that two plates 21 and 22 are pivotally supported from the forward extremities of side members 1 and 2 and that levers 12 and 13 extend upwardly therefrom, which levers may be operated independently to adjust the height of the rotatable cutting members 10 and 19 which are supported by elongate structures that extend forwardly from the plates.

Obviously any prior use of the device disclosed in appellant's patent No. 2,618,919 or shown in appellees' physical Exhibit C cannot invalidate the claims in suit, for each of these claims carries the structural limitation of a cutter supporting member which is disposed to one side of the base and extends forwardly therefrom. Certainly this structural limitation precludes any possibility that the claims in suit read on or describe the devices shown in appellee's physical Exhibit C and in appellant's patent No. 2,618,919 which include as essential elements:

(a) side members 1 and 2 that extend forwardly from a base;

(b) racks 4 and 23.1 united to or formed integral with said side members at their forward ends;

(c) levers 12 and 13;

(d) plates 21 and 22 that pivotally support said levers from the forward end portions of said side members;

(e) two elongate cutter supporting assemblies extending forwardly from plates 21 and 22 and rigidly affixed thereto.

These elements (a) to (e) inclusive are not included in the combination of elements defined by the claims in suit, and would serve no useful function if so included.

Reply to Appellees' Point II.

Appellees' contention that the claims in suit cannot be interpreted broadly enough to be infringed by the accused device is without basis or foundation, for as previously argued, the claims in suit do not read on or describe the device shown in appellees' physical Exhibit C nor the device disclosed and described in appellant's patent

No. 2,618,919. Furthermore, the claims in suit do not read upon the device disclosed or claimed in the Boggs patent, nor upon the Boggs device, which is the same as shown in the Boggs patent drawing. The Boggs patent was cited as a reference by the Patent Office during the time the claims in suit were under prosecution, and these claims were subsequently allowed without alteration by the Patent Office over the Boggs disclosure. Appellees have presented no evidence of any type whatsoever to substantiate the contention that the Boggs device could be used for any purpose other than the lawn edging, in contrast to the invention defined in the claims in suit which is adapted for the edging and trimming of lawns with but a single power-driven rotatable cutter.

In *Topliff v. Topliff*, 145 U. S. 156 at 161, 36 L. Ed. 658, 12 S. Ct. 825, 1892 C. D. 402, Mr. Justice Brown stated:

“While it is possible that the Stringfellow and Surles patent might, by a slight modification, be made to perform the function of equalizing the springs which it was the object of the Augur patent to secure, that was evidently not in the mind of the patentees, and the patent is inoperative for that purpose. Their device evidently approached very near the idea of an equalizer; but this idea did not apparently dawn upon them, nor was there anything in their patent which would have suggested it to a mechanic of ordinary intelligence, unless he were examining it for that purpose. It is not sufficient to constitute an anticipation that the device relied upon might, by modification, be made to accomplish the function performed by the patent in question, if it were not designed by its maker, nor adapted, nor actually used, for the performance of such functions.”

Appellees' contention that the claims in suit do not cover the accused device because the claims require that the "wheel means" itself permit angular adjustment of the base, is without foundation, for appellees likewise use wheel means for this precise purpose as so admitted in reply to Request for Admission of Facts 5, 6, 7, 8 and 11 [Tr. pp. 5-7 and 37-38]. In an attempt to circumvent infringement of the claims in suit appellees have used a plurality of wheels to adjustably support the base relative to the ground surface rather than a single wheel as shown in the drawings of the patent in suit. In the narrower claims of the patent in suit, such as Claims 1 to 5 inclusive, appellant has defined his invention as including a supporting wheel journaled to the base. However, appellant realized that other wheel arrangements could be utilized to adjustably support the base relative to the ground surface, and accordingly in the broader claims, such as Claim 16, has defined the invention more broadly; namely, by "wheel means that movably support said base for angular adjustment thereof relative to the surface on which said wheel means rests." The three-wheel support utilized in the accused device is the equivalent of the single wheel disclosed in the drawing and described in the specification of the patent in suit. In *Machine Co. v. Murphy*, 97 U. S. 120, 125, the question of equivalence was considered and the Court stated:

"Except where form is of the essence of the invention, it has but little weight in the decision of such an issue, the correct rule being that, in determining the question of infringement, the court or jury, as the case may be, are not to judge about similarities or differences by the names of things, but are to look at the machines or their several devices or elements in the light of what they do, or what

office or function they perform, and how they perform it, and to find that one thing is substantially the same as another, if it performs substantially the same function in substantially the same way to obtain the same result, always bearing in mind that devices in a patented machine are different in the sense of the patent law when they perform different functions or in a different way, or produce a substantially different result.”

Reply to Appellees’ Point III.

Appellees’ discussion as to the co-pendency of appellant’s two patent applications, Serial No. 168,506 and Serial No. 419,916, is not considered material or relevant to the infringement of the claims in suit, as each of these applications defined and claimed a completely separate and distinct invention. The claims in suit carry structural limitations that preclude them from reading on or describing appellees’ Exhibit B, or the device disclosed and described in appellant’s patent No. 2,618,919. Hence, for the reasons previously submitted in detail, there is no possibility that the claims in suit can be invalidated by prior public use of appellees’ Exhibit B.

Reply to Appellees’ Point IV.

The appellees admit that the accused structure has a base which can be angularly adjusted, but in spite of their replies to Requests for Admission of Facts 5, 6, 7, 8 and 11 [Tr. pp. 5-7 and 37-38], appellees do not admit that the wheel means movably support the base for such adjustment. Instead, appellees attempt to explain away their replies to the above-mentioned Request for Admissions on the grounds that adjustment in the accused device is obtained by a leverage or linkage system and not

by the wheel means. By a play on words appellees seek to confuse the issue of infringement when they describe their three wheels as a leverage or linkage system rather than “wheel means that movably support said base for angular adjustment thereof relative to the surface on which said wheel means rests,” as set forth in Claim 16. Whether infringement exists depends upon the actual structure incorporated in the accused device, and not on what appellees choose to term this structure. In *Montgomery Ward & Co. v. Clair*, 51 U. S. P. Q. 499, 503 (C. C. A. 8) the Court stated:

“It is settled that to sustain the charge of infringement the infringing device must be substantially identical with the one alleged to be infringed in (1) the result attained; (2) the means of attaining that result; and (3) the manner in which its different parts operate and cooperate to produce that result.”

Taking these criteria in order, the elements in the accused device are so combined as to (1) provide the same result attained by the combination of elements defined in the claims in suit; (2) utilize the same means of attaining those results; (3) and the elements cooperate to produce those results in the same manner as the elements in applicant's invention. Clearly, the elements in the accused device are so combined as to infringe the claims in suit.

Reply to Appellees' Point V.

Should the Court of Appeals reverse the District Court's judgment of non-infringement, the Court of Appeals should remand the case for determination of the issue of validity for:

(a) The Trial Court expressly did not rule on this issue [Tr. p. 68].

(b) Appellees introduced as evidence in the trial the testimony of three witnesses including defendant Louis Faas in an attempt to invalidate the patent in suit.

(c) These three witnesses are not before the Court of Appeals, and the Court of Appeals is accordingly not in as good a position to evaluate their testimony as the Trial Court.

Conclusion.

The judgment of non-infringement should be reversed and the case remanded for trial on the issue of validity.

Dated August 30, 1956.

Respectfully submitted,

WILLIAM C. BABCOCK,

Attorney for Appellant, Ralph O. Hutchens.

No. 15116

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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For the Appellees, Mar-Le Wendt and Albert D.
Rosellini:

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Seattle 4, Washington.

For the Appellee, Pacific Telephone & Telegraph
Company:

McMICKEN, RUPP & SCHWEPPE,
657 Colman Bldg.,
Seattle 4, Washington.

In the United States District Court for the Western District of Washington, Northern Division

No. 3577

MAR-LE WENDT and ALBERT D. ROSEL-
LINI, Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT

Comes Now plaintiff Mar-Le Wendt and for cause of action alleges:

I.

That plaintiff is a married woman living separate and apart from her husband and is a citizen of the State of Washington and of the United States, residing within the above described judicial district; that all acts and omissions to act herein complained of took place in the above described judicial district.

II.

That this action arises under the Act of June 25, 1948, 62 Stat. 933, 937; U.S.C. Title 28, Sections 1346(b), 1402(b), as hereinafter more fully appears.

III.

That at all times herein mentioned there was in force that Traffic Code of the City of Tacoma, Washington, Ordinance No. 11701, entitled

“An ordinance regulating travel and traffic on the streets of the City of Tacoma; providing a penalty for the violation thereof; repealing ordinances 10598, 11054, 11385 and 11617, and all ordinances and parts of ordinances in conflict herewith, and declaring that this ordinance shall take effect immediately after publication.”

which was signed by the Mayor of the City of Tacoma, Washington, on June 14, 1939, and became effective on June 26, 1939.

IV.

That at all times herein mentioned, plaintiff Albert D. Rosellini was the owner of a certain 1950 Nash sedan; that at all times herein mentioned plaintiff Mar-Le Wendt was the driver and sole occupant of said Nash sedan.

V.

That at all times herein mentioned one William L. Brown was employed by the United States of America as a unit property custodian for Battery C, 770th A.A.A. Battalion, State of Washington, National Guard; that all acts herein complained of were performed by said William L. Brown within the scope of said employment.

VI.

That on or about the 11th day of March, 1953, at about 11:45 a.m., said William L. Brown was driving a certain two and a half ton truck with attached trailer, north on South Tacoma Way, a pub-

lie highway located partly within the City of Tacoma, Pierce County, State of Washington. That there was no brake hook-up between said truck and trailer. That said truck was owned by the United States of America, and bore license number USA 41188153; that said trailer was loaded with a generator M-1, serial number 055109; that the gross weight of said trailer and generator was 8,100 pounds. That at or near the intersection of the south city limit of the City of Tacoma, Washington, with said South Tacoma Way, the Pacific Telephone and Telegraph Company, a corporation, by its agents, employees and servants, was then and there making repairs to sub-surface telephone lines located under the easterly side of said South Tacoma Way. That a warning sign had been erected south of the point of said repairs by said Pacific Telephone and Telegraph Company; that because of the negligent failure of defendant to provide and use proper and adequate brake connections between said truck and trailer and because of the negligent operation of said truck and trailer by said William L. Brown as he approached said warning sign, said truck and trailer swerved to the left and into the southbound lanes of traffic of said South Tacoma Way striking and colliding with said Nash automobile being operated by plaintiff Mar-Le Wendt in a southerly direction of South Tacoma Way. That said negligence was in violation of the ordinances of the City of Tacoma, Washington, and the laws

of the State of Washington, and the proximate cause of the injuries and damage to plaintiff as hereinafter appears.

VII.

That as a direct and proximate result of the said negligence of defendant, plaintiff Mar-Le Wendt sustained severe and permanent physical injuries and grievous pain of mind and body. That plaintiff has incurred bills for doctors, hospitals and other medical expenses in a sum not presently capable of determination, all to said plaintiff's damage in the sum of \$200,000.00.

For a Second and Separate Cause of Action
Against Defendant, Plaintiff Albert D. Rosellini Alleges:

I.

That plaintiff Albert D. Rosellini is a citizen of the State of Washington and of the United States, residing within the above described judicial district, and at all times herein mentioned was the owner of a certain 1950 Nash sedan automobile.

II.

That plaintiff Albert D. Rosellini by this reference incorporates herein and makes a part hereof as though fully set forth herein, all the allegations contained in paragraphs II through VI, inclusive, of plaintiff Mar-Le Wendt's first cause of action.

III.

That as a direct and proximate result of the said negligence of defendant, the fair market value of plaintiff Albert D. Rosellini's said 1950 Nash auto-

mobile was reduced in the sum of \$2,250.00 from its fair market value immediately preceding said collision. That as a further direct and proximate result of said negligence, said plaintiff lost the use of said automobile for an extended period and was thereby injured to the extent of \$760.00, all to said plaintiff's damage in the sum of \$3,010.00.

Wherefore plaintiff Mar-Le Wendt prays for judgment against defendant on the first cause of action in the sum of \$200,000.00.

Wherefore plaintiff Albert D. Rosellini prays for judgment against defendant in the second cause of action in the sum of \$3,010.00, and for their costs and disbursements herein to be taxed.

/s/ MERWIN E. CASEY,
Attorney for Plaintiffs.

Duly verified.

[Endorsed]: Filed October 15, 1953.

[Title of District Court and Cause.]

No. 3577

ORDER TRANSFERRING CAUSE
TO SOUTHERN DIVISION

The parties hereto by their respective counsel having by stipulation agreed that the proper venue of the above-entitled action is the Southern Division of the Western District of Washington, now, there-

fore, in pursuance of the provisions of Rule 1406, Federal Rules of Civil Procedure, and in the furtherance of justice, it is hereby

Ordered that the above-entitled action be and the same is hereby transferred to the Southern Division of the Western District of Washington, and the Clerk is hereby directed to transmit his file herein to the Southern Division.

Done in Open Court this 11th day of December, 1953.

WILLIAM J. LINDBERG,
United States District Judge.

Presented by:

JOHN E. BELCHER,
Asst. United States Attorney.

Approved for entry, presentation waived.

M. E. CASEY,
Attorney for Plaintiffs.

Certified true copy.

[Endorsed]: Filed December 11, 1953.

United States District Court, Western District
of Washington, Southern Division
No. 1758

MAR-LE WENDT and ALBERT D. ROSEL-
LINI, Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendants.

ANSWER

Comes now the defendant, United States of America, and for its Answer to the complaint and the Cause of Action of plaintiff, Mar-Le Wendt, alleges as follows:

I.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph numbered I of the Complaint and said Cause of Action of the plaintiff, Mar-Le Wendt, and therefore denies the same.

II.

For answer to paragraph II of said Complaint and its Cause of Action first stated, defendant denies that this action arises under the Act of June 25, 1948, 62 Stat. 933, 937; U.S.C. Title 28, Sections 1346(b), 1402(b), for the reasons hereinafter more fully stated in its affirmative defense hereto.

III.

Defendant admits the allegations contained in paragraphs III and IV of said Complaint and its Cause of Action first stated.

IV.

Answering paragraph V of said Complaint and said Cause of Action, defendant admits that at the time mentioned therein William L. Brown was a unit property custodian for Battery C, 770th A.A.A. Battalion, State of Washington, National Guard, but denies each and every other allegation therein contained, and especially denies that said William L. Brown was at said time employed by the United States of America in the alleged capacity or in any other capacity whatsoever.

V.

For Answer to paragraph VI of said Complaint and said Cause of Action, defendant admits that at about the time and at the place mentioned therein, said William L. Brown was driving a certain two and a half ton truck with attached trailer, north on South Tacoma Way, a public highway located partly within the City of Tacoma, Pierce County, State of Washington, and that said truck was owned by the United States of America, and bore license number USA 41188153. Defendant further admits that at or near the intersection of the south city limit of the City of Tacoma, with said South Tacoma Way, the Pacific Telephone and Telegraph Company, a corporation, by its agents, employees and servants, was then and there making repairs to sub-surface telephone lines located under the easterly side of South Tacoma Way, and that as said truck and trailer approached the point of said repairs the truck collided with said Nash automobile being operated by plaintiff Mar-Le Wendt in

a southerly direction on South Tacoma Way; that as to each and every other allegation and thing contained in said paragraph VI defendant denies the same, and particularly denies that defendant or said William L. Brown, said driver, were in any wise negligent or in any respect responsible for the accident therein mentioned, and in this connection defendant states that said William L. Brown was operating said truck and trailer in the manner provided by law, as is more particularly hereinafter set forth in the affirmative part of defendant's answer.

VI.

For answer to paragraph VII of the Complaint and said Cause of Action, this defendant alleges that if the plaintiff Mar-Le Wendt suffered any injuries, as the same are therein alleged, that such injuries were caused without any neglect or fault on the part of this defendant or the driver of said truck, and particularly denies that said plaintiff named herein has been damaged in the sum of \$200,000.00 as therein set forth, or in any other sum whatsoever, by reason of any negligence on the part of this defendant or of the driver of the said truck.

For Answer to the Complaint and Cause of Action of Plaintiff Albert D. Rosellini Above Named, Defendant Alleges as follows:

I.

Defendant admits the allegations contained in paragraph I of the Second Cause of Action contained in said Complaint.

II.

Answering paragraph II of said Complaint and said Cause of Action, defendant refers to paragraphs II through V, inclusive, of defendant's Answer to the Complaint and Cause of Action of plaintiff Mar-Le Wendt and by this reference incorporates the same herein.

III.

For answer to paragraph III of the Complaint and said Cause of Action, this defendant alleges that if the plaintiff Albert D. Rosellini suffered any damages, as the same are therein alleged, that such damages were caused without any neglect or fault on the part of this defendant or the driver of said truck, and particularly denies that said plaintiff Albert D. Rosellini has been damaged in the sum of \$3,010.00, as therein set forth, or in any other sum whatsoever, by reason of any negligence on the part of this defendant or of the driver of said truck.

Further answering plaintiffs' complaint, and by way of a First Affirmative Defense thereto and each Cause of Action, this defendant alleges:

I.

That at the time of the accident mentioned in the Complaint, William L. Brown therein mentioned was an employee of the State of Washington Military Department and in addition to operator of said truck was a Unit Material Caretaker for Battery C, 770th A.A.A. Gun Battalion, and was driving said truck, a 2½-ton 6x6, GMC Cargo, Model M211,

loaded with a truck, 1/4-ton 4x4 and towing Trailer, Generator, M7, loaded with a Director, M9, and transporting said unit equipment to Seattle, Washington, which truck and the accountability therefor had theretofore been transferred to the State of Washington and the unit mentioned herein, and neither the unit of which said William L. Brown, a master sergeant therein, was a member, nor the sergeant himself, were in the active federal military service at the time of said accident, nor was he an employee of the federal government acting within the scope of any federal office or federal employment at the time in question within the meaning of the statute whereby the United States of America has consented to be sued for and on account of the negligent or wrongful acts or omissions of any of its employees while acting within the scope of his office or employment, and for such reason this defendant also disclaims liability for any damages allegedly incurred by the plaintiffs on account of any alleged negligence on the part of said William L. Brown.

By Way of a Second Affirmative Defense to Plaintiff's Complaint and Each Cause Thereof, This Defendant Alleges:

I.

That at all times mentioned in plaintiff's Complaint there was in force and effect an Ordinance of the City of Tacoma, Washington, Ordinance No. 12947, entitled:

“An ordinance relating to and regulating the obstruction of streets, alleys and public

places of the City of Tacoma, providing penalties for the violation thereof and repealing Ordinances Nos. 2239, 3257 and 9895''

which was signed by the Mayor of the City of Tacoma, Washington, on October 9, 1946, and became effective on October 21, 1946.

II.

That at all times mentioned herein and material hereto, plaintiff Mar-Le Wendt was the agent and employee of plaintiff Albert D. Rosellini and was acting within the course and scope of her employment, for and in his behalf, with his consent, and at his direction.

III.

That if the plaintiff Mar-Le Wendt suffered any injury to her person, and if the plaintiff Albert D. Rosellini suffered any damage to his property, as set forth in their complaint, as their respective causes of action herein, such injury and any other damage, if sustained, were not caused by reason of any act, omission or negligence on the part of the defendant, or on the part of said William L. Brown, the driver of said truck, but, if sustained, were directly and proximately caused by the negligent acts and omissions of the Pacific Telephone and Telegraph Company, its agents, servants and employees, who at the time and place herein mentioned and material hereto, and while acting within the scope of their employment were on behalf of said company making repairs to its sub-surface telephone lines located under the easterly side of South Tacoma Way, a public highway, at a point thereon

within the corporate limits of said City of Tacoma; and in addition thereto any injury or damage so sustained were also directly and proximately caused by the negligence and omissions of plaintiff Mar-Le Wendt, the driver of the Nash automobile owned by plaintiff Albert D. Rosellini.

IV.

That said Pacific Telephone and Telegraph Company, its agents, servants and employees, were negligent in the premises in that they negligently failed to post and maintain proper and adequate signs or warnings a sufficient distance to the south of said point of repairs, thereby causing the truck being driven by said William L. Brown in a northerly direction along said South Tacoma Way to swerve into the southbound lanes of traffic of said South Tacoma way and to strike and collide with said Nash Automobile being operated in a southerly direction thereon, which negligence on the part of said company, its agents, servants and employees was in violation of the ordinances of the City of Tacoma, Washington, and of the laws of the State of Washington.

V.

That plaintiff Mar-Le Wendt was negligent in the following particulars:

1. Operating the vehicle being driven by her at an excessive and unlawful rate of speed under the conditions and circumstances then and there existing.
2. Failing to keep a lookout for other users of

the highway, and especially of the vehicle being driven by William L. Brown.

3. Failing to keep her vehicle under control.

4. Failing to exercise reasonable care to avoid said collision, when she saw the peril to herself and said William L. Brown, or should have seen the same, and that a collision between the vehicles being driven by each of them was imminent.

Wherefore, having fully answered, defendant prays that this action and the Complaint of plaintiffs, Mar-Le Wendt and Albert D. Rosellini, be dismissed, and that defendant have its costs and disbursements herein to be taxed as provided by law.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ GUY A. DOVELL,
Assistant United States At-
torney.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 8, 1954.

[Title of District Court and Cause.]

MOTION TO STRIKE

Come Now the plaintiffs and respectfully move the court for an order striking defendant's first affirmative defense from its Answer on the ground that no defense to plaintiffs' causes of action is therein stated.

/s/ ROSELLINI & CASEY,
Attorneys for Plaintiffs.

[Endorsed]: Filed January 27, 1954.

[Title of District Court and Cause.]

No. 1758

ANSWERS TO INTERROGATORIES DIRECTED TO DEFENDANT UNITED STATES OF AMERICA BY PLAINTIFF

Comes now the United States of America, the defendant named in the above-entitled action, and submits its answers to those certain interrogatories heretofore served upon it by plaintiff, to wit:

(The following numbers refer to the number of interrogatory.)

1. William L. Brown who resides at 624 7th Avenue, Kirkland, Washington.

2. The occupation of the driver at the time of the accident was Unit Material Caretaker of Battery "C," 770th AAA Gun Battalion, a unit of the National Guard of the State of Washington.

3. The driver was employed by the National Guard of the State of Washington.

4. The driver was a member of, and employed as caretaker of Battery "C," 770th AAA Gun Battalion, a unit of the National Guard of the State of Washington. The Commanding Officer of this unit was First Lieutenant Marvin G. Wubbins, of the Washington National Guard.

5. The driver was customarily paid by a Department of the Treasury check by the finance officer designated to pay all National Guard vouchers for the National Guard of the State of Washington.

The funds are drawn from those allotted by the Secretary of the Army to the State of Washington for the support of its National Guard, under the authority of Section 90, National Defense Act, as amended.

6. The driver was employed full time. His duties were to perform maintenance, at the organizational level, on the equipment for which the unit commander was the responsible officer and individual, and all other like duties prescribed by the unit commander and the Adjutant General of the State of Washington.

7. The driver received no additional compensation or pay.

8. The files of this office reveal that the driver did hold a valid State of Washington driver's license.

9. This office has been unable to ascertain whether the driver held a United States Army driver's license. It would seem, however, that this question is irrelevant.

10. At the time of the accident, the driver was operating the vehicle on the business of and in behalf of his unit of the National Guard of the State of Washington, on the authority of Special Orders No. 67, dated 8 March, 1953, issued by the Adjutant General of the State of Washington, copies of which would be available at that office.

11. This is a theoretical question, irrelevant and inapplicable in the instant case, and calling for a legal conclusion available to the plaintiffs. Answer is declined, unless otherwise directed.

12. At the time of the accident the driver was under the control and supervision of his commanding officer, First Lieutenant Marvin G. Wubbins, and the Adjutant General of the State of Washington. Both of these individuals are members of the Washington State National Guard, and their addresses are contained in the records thereof.

13. The unit of the National Guard of the State of Washington by which the driver was employed was subsidized by federal funds appropriated annually for the support of the National Guard of the State and Territories by authority of Section 67, National Defense Act, as amended. The unit was not subject to federal supervision, except that it was required to maintain certain standards of training and maintenance of equipment as a prerequisite to federal recognition, upon which depended its access to federal funds. The annual inspection for federal recognition covers the matters of: (a) amount and condition of the property in the hands of the unit; (b) whether the unit is properly organized; (c) whether the officers and enlisted men meet the prescribed qualifications; (d) whether the officers and enlisted men are properly armed, equipped, uniformed, and being trained and instructed adequately; (e) and whether records are being kept according to the provisions of the National Defense Act. The reports of such inspections shall serve as the basis for deciding as to the issue to and retention by the National Guard unit of the Military property provided, and for determining

what organizations and individuals shall be considered as constituting parts of the National Guard. Section 93, National Defense Act.

14. Title to the truck and trailer were in the United States. The responsible officer was First Lieutenant Marvin G. Wubbins. The accountable officer was the Acting United States Property and Disbursing Officer for the State of Washington, under provisions of Section 67, National Defense Act. The accountability was transferred for the trailer in August, 1948, from the Department of the Army to the United States Property and Disbursing Officer for the State of Washington. Accountability for the truck was likewise transferred on 18 November, 1952.

15. The purpose of the trip was to transport vehicles and supplies in behalf of, and on the business of Battery "C," 770th AAA Gun Battalion, a unit of the National Guard of the State of Washington.

16. It is unknown where the driver picked up or received the vehicle. As these vehicles are in the possession of the unit of the National Guard of the State of Washington to which assigned, it is suggested that the information as to whether the driver signed any documents be obtained from him, or the National Guard of the State of Washington.

17. This information should also be available in the records of the National Guard of the State of Washington.

18. The truck was a General Motors Corporation 21½ Ton Cargo Truck 6 x 6, Stock Number 557. The trailer was a Trailer Generator, M7.

19. This office has been unable to ascertain this information. As the vehicles are in the possession of the unit of the National Guard of the State of Washington to which assigned, it is suggested that the information be sought there.

20. The question as to the operation of the brakes should also be obtained from the National Guard of the State of Washington. The gross weight of the truck was 12,850 pounds, and that of the trailer 4,150 pounds.

21. This information will likewise have to be obtained from the National Guard of the State of Washington.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ GUY A. B. DOVELL,
Assistant United States Attorney, Attorneys for
Defendant, United States of America.

United States of America,
Western District of Washington,
Southern Division—ss.

Guy A. B. Dovell, being first duly sworn, on oath deposes and says:

That he is an Assistant United States Attorney, and one of the attorneys for the defendant, United States of America, herein; that he has prepared the foregoing answers to interrogatories from informa-

tion made available to him through official communication with the Judge Advocate General's Office of the Department of the Army, and that to the best of his knowledge and belief, the said answers are true; that this affiant is verifying said answers to interrogatories for the reason that no official of the Department of the Army is presently available for executing this verification.

/s/ GUY A. B. DOVELL.

Subscribed and sworn to before me this 8th day of September, 1954.

/s/ ROSEMARY D. SWEENEY,
Deputy Clerk, United States District Court, Western District of Washington.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Sept. 8, 1954.

[Title of District Court and Cause.]

No. 1758

DEFENDANT'S MEMORANDUM IN OPPOSITION
TO PLAINTIFF'S MOTION TO
STRIKE

As a First Affirmative Defense to plaintiffs' action, defendant United States of America has set up the defense that Sergeant William L. Brown, described in the complaint as a unit property custodian of the Washington National Guard, was not

at the time in question employed by the United States in any capacity.

This contention is factually supported by the personnel records obtained from the Military Department, State of Washington, which discloses the following:

1. That on 22 December, 1950, the Commanding Officer of the Clearing Company, 116th Medical Battalion, Washington National Guard, filed a request with the Adjutant General, State of Washington, that Sergeant William L. Brown, a member of that organization, be employed as a civilian maintenance employee for this unit at a starting salary of \$2,800.00 annually.

2. That on 4 January, 1951, the office of the Adjutant General, State of Washington, issued Special Orders No. 4 by Direction of the Governor, paragraph 3 of which appointed Sergeant Brown unit caretaker of the organization requesting the appointment;

3. That on 22 February, 1951, the office of the Adjutant General, State of Washington, issued Special Orders No. 53 by Direction of the Governor, paragraph 9 of which order granted Sergeant Brown, and others named therein, within grade promotions and increased pay;

4. That on 25 September, 1951, the office of the Adjutant General, State of Washington, issued Special Orders No. 268 by Direction of the Governor, paragraph 1 of which granted Sergeant Brown a further raise in pay;

5. That on 13 January, 1952, the office of the Adjutant General, State of Washington, issued Special Orders No. 13 by Direction of the Governor, granting Sergeant Brown and others named therein, an adjusted salary scale and retroactive pay;

6. That on 2 October, 1952, the Commanding Officer of the Clearing Company, 116th Medical Battalion, requested that the Adjutant General, State of Washington, terminate the services of Sergeant Brown as unit cartaker of that organization;

7. That simultaneous to request mentioned in preceding paragraph (6), the Commanding Officer of Battery C, 770th AAA Gun Battalion, Washington National Guard, requested that Sergeant Brown be appointed as unit caretaker of that organization;

8. That on 12 October, 1952, the Office of the Adjutant General, State of Washington, issued Special Orders No. 286 by Direction of the Governor, paragraphs 1 and 2 of which order terminated Sergeant Brown's appointment as unit caretaker of the Clearing Company, 116th Medical Battalion, and appointed him unit caretaker of Battery C, 770th AAA Gun Battalion;

9. And that on 8 March, 1953, the Office of the Adjutant General, State of Washington, issued Special Orders No. 67 by Direction of the Governor, whereby Sergeant Brown, and others named

therein, were to proceed from Seattle to Camp Murray for the purpose of transporting vehicles and supplies of the National Guard, the trip on which Sergeant Brown was engaged at the time of the accident which gave rise to this action.

It is especially worthy of notice that in the entire history of Sergeant Brown's employment, from the moment when it was first recommended, no official, officer, or employee of the Federal Government is directly involved in the transactions from which stems Sergeant Brown's status.

The defendant in support of the actual facts must oppose the basic assumption relied upon by the Tenth Circuit in its decision in the case of *U. S. v. Holly*, 192 F. 2d 221, namely, that the Adjutant General of a State, or the Governor by whose direction and in whose name he acts, are acting as agents of the Secretary of the Army in the hiring, firing, direction and control of unit caretakers. Such assumption is completely fallacious and untenable.

Obviously, unless this fiction is resorted to, the Court cannot point out one single element of control exercised by officers or officials of the Federal Government, or the presence of any of the other ordinary factual and legal attributes that encompass the employer-employee relationship as commonly known.

If the argument was advanced that the Secretary of the Army could terminate this so-called agency relationship created by the fiction of the *Holly* case, if dissatisfied with the service performed or for any other reason a principal can terminate an

agency, such an argument would be patently facetious.

The Secretary of the Army is without any authority to control the Adjutant Generals of the States, and, consequently, the essential elements of an agency relationship simply do not exist. Historically speaking, the relationship between the National Guards of the States and Territories and the Federal Government, as represented by the Department of the Army, has been and still is characterized by the resistance of the States and their National Guards to any encroachment by the Federal Government on the authority and integrity of the National Guard as a State institution within the framework of the Constitution. The principal purpose of such regulations as are issued by the Secretary of the Army pertaining to unit caretakers is to achieve uniformity between the various States, and to create minimum operational standards. Adherence to the regulations and standards imposed then becomes the criteria for determining whether federal funds are allotted or withheld. To the same degree, regulations prescribe the pay and emoluments of the ordinary guardsman, enlisted or officer; and other regulations set up standards of training and proficiency which must be met if federal recognition is extended to the individual guardsman and his unit, as a condition precedent to the allocation and release of the funds appropriated by Congress from which all guardsmen are paid, including such civilian employees as caretakers, etc. In other

words, such control as is or can be exercised by the Secretary of the Army acting through the National Guard Bureau and regulations issued thereby, is of the persuasive character inherent in the Secretary's authority over allocations of federal funds to the support of the National Guard of the States and Territories.

See in the above connection, *U. S. v. Dern*, 74 F. 2d 485.

In *United States v. Holly*, 192 F. 2d 221, at page 223, the Court, after reviewing directive statutes and regulations, arrives at the conclusion:

“There is present every element necessary to constitute a unit caretaker an employee of the United States.”

In support of this proposition, the Court cites three cases, namely, *Singer Manufacturing Co. v. Rahn*, 132 U. S. 518; *United States v. Wholesale Oil Co., Inc.*, 10th Cir. 154 F. 2d 745; and *Jones v. Goodson*, 10 Cir., 121 F. 2d 176.

In the *Singer* case, *supra*, the Court at page 523, held:

“In short, Corbett, for the commissions to be paid him, agrees to give his whole time and services to the business of the Company; and the Company reserves to itself the right of prescribing and regulating not only what business he shall do, but the manner in which he shall do it; and might, if it saw fit, instruct him what route to take, or even at what speed to drive.”

If the Congress had intended to utilize federal employees to take care of Government property loaned to the States, certainly Sec. 42, Title 32, U. S. Code, was a roundabout expression for any such purpose. The protection of Government funds as expressed in the last proviso of that section could not reasonably be considered a contract engaging federal civilian employees.

If the Court, in *U. S. v. Holly*, *supra*, had given consideration to the facts of employment rather than misinterpreting the purpose of a regulatory standard for service entitling the use of federal funds in payment of such service, the Court might consistently have arrived at the administrative construction placed upon the position of unit caretakers. Instead, the Court preferred to read into the regulations a meaning of employment never intended by Congress either in connection with the National Guard legislation nor the Federal Tort Claims Act. Upon the faulty premise of the *Holly* case, two more decisions, namely, *Elmo v. U. S.*, 197 F. 2d 230, and *U. S. v. Duncan*, 197 F. 2d 233, have followed.

In addition to what has been said relative to the lack of support of the *Singer* case, cited by the Court in the *Holly* case, neither of the other two cases cited appear to lend any support.

The *Wholesale Oil Co.* case, *supra*, involved the question of whether a station operator was an employee or an independent contractor of the Oil Company under their contract of operation. The *Good-*

son case also involved the question of Social Security Taxes in the case of the driver for a taxicab operating company. However, it is upon these three cases the Court in the Holly case found and determined a legal basis for the conclusion quoted above, namely:

“There is present every element necessary to constitute a unit caretaker an employee of the United States.”

All three cases cited in the Holly case involved the issue of whether or not the party in question was an employee of the Company involved or an independent contractor.

Such was never the issue in any of the three cases which now hold the unit caretaker to be a federal employee.

Defendant must point to the fact that the limitations on the National Guard Unit caretaker's relations with the United States are so clearly fixed by Title 32, U. S. Code, Secs. 42 and 42a, that it cannot be reasonably contended such caretaker may at any time act in an “official capacity” on behalf of a Federal agency within the contemplation of the Federal Tort Claims Act, which states:

“‘Employee of the government’ includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, tem-

porarily or permanently in the service of the United States, whether with or without compensation.”

Nor can it be reasonably contended that the National Guard is a federal agency or that National Guard unit caretakers are officers of a federal agency. For the reason the power of appointment must be vested in a source recognized by the Constitution as appropriate to the appointment of federal officers.

With all due respect to the Court’s determination in the Holly case, still it should be observed that no National Guard unit caretaker exercises any of the sovereign power of the United States, none holds an appointment from the President, the Secretary of Defense, or the Secretary of the Army; and none executes an oath of office or files the affidavit relative to non-assistance in obtaining the appointment required of all federal officers.

In *United States v. Dern*, *supra*, decided December 3, 1934, the Court of Appeals for the District of Columbia in a mandamus proceeding involving right to retention of a Government pension while serving as brigadier general of the line of the National Guard of the State of New York, at page 486 of the reporter, observed:

“Under the provisions of this act (National Defense Act, 39 Stat. 166) petitioner, as brigadier general in the New York National Guard, was charged with the duty of instructing in

military science the infantry regiments maintained by the state as part of its National Guard. He likewise had authority over the fiscal affairs of certain of the armories in the state and supervisory authority over federal military property and supplies loaned or furnished the State by the federal government.”

(Underscoring supplied.)

* * *

“The United States has not appointed, and constitutionally cannot appoint or remove (except after being called into federal service), officers of the National Guard for there must be a State National Guard before there can be a National Guard of the United States, and the primary duty of appointing the officers is one of the powers reserved to the states. But while this is true, it is also true that Congress has authority to determine the extent of the aid, support, and assistance which shall be given the National Guard of the various states and the terms upon which it shall be granted. Houston v. Moore, 5 Wheat. 16, 5 L. Ed. 19. This flows from the power to organize, arm, and discipline. But, except when employed in the service of the United States, the whole government of the militia is within the province of the state, and this follows because of the precise limitations of the constitutional grant. The United States may organize, may arm and may discipline, but all of this is in

contemplation of, and preparation for, the time when the militia may be called into the national service. Until that event, the government of the militia is committed to the states. People v. Hill, 126 N. Y. 497, 27 NE. 789. From this it follows that petitioner's argument that he is an officer of the Army and subject to discipline or removal in accordance with the Articles of War is without foundation. Nor is there any more doubt that Congress has the power to withhold federal recognition from all or any part of the militia in its discretion, or to impose the conditions of its acceptance. This power is a necessary attribute of the Constitutional grant." (Underscoring supplied.)

Certainly the foregoing decision should dispel the fictitious idea that the Federal Government is maintaining a "watchguard" in the National Guard units of the various states.

Plaintiffs in their brief advance the idea that Sergeant Brown would receive United States Employees' Compensation in case of death or disability. The United States Employees' Compensation Commission is the only federal agency which has treated the unit caretaker as a federal employee. Needless to say that the Department of the Army considers this agency 100% wrong in its conclusions.

However, it might be said, that in the field of compensation there has often appeared to exist gaps or "twilight zones" in which some agency has, in the absence of specific designation, stepped into the

unclaimed domain, and administered needed relief. This has not been held determinative of character of employment.

See *Western Boat Building Co. v. O'Leary*, 198 F. 2d 409.

State judicial decisions emphasize that members and employees of the National Guard, not in active service, are State employees. There is no indication, judicial, legislative or administrative, that Congress intended to change the status of these people, by the enactment of the Federal Tort Claims Act.

Workmen's Compensation Act decisions have occasioned most of the judicial discussion on the subject.

In Washington and Illinois a guardsman is a State employee, although the legislature did not provide coverage for guardsmen under the Compensation Act.

See *Thompson v. Dept. of Labor and Industries*, 78 P. 2d, 170 (1938); *Rector v. Cherry Valley Timber Co.*, 196 P. 653 (1921); and *Hays v. Illinois Terminal Association*, 2 N.E. 2d 309 (1936).

In Wisconsin, North Carolina, Idaho, Virginia and Oklahoma, guardsmen are recognized as State employees under local compensation statutes.

State v. Johnson,
202 N.W. 191 (Wis., 1925);

Baker v. State,
156 S.E. 917 (N. C., 1931);

Griffith v. National Guard,
212 P. 2d 403 (Ida., 1949) ;

Globe Indemnity Co. v. Forrest,
182 S.E. 215 (Va., 1935) ;

Mountcastle v. State,
145 P. 2d 392 (Okla., 1943).

In New York and Nebraska their State status is recognized.

Gibson v. State,
19 N. Y. S. 2d 405 (1940) ; and

Nebraska National Guard v. Morgan,
199 N.W. 557 (1924).

If the conclusion of the agency involved, the Department of the Army is entitled to be given weight, then it must be stated that the Army remains of the view consistently taken in National Guard caretaker cases, namely, that individuals occupying this status are State employees, and stand in no different position than that of any other National Guardsman not in active federal military service. In a long line of unbroken decisions, the most recent of which is *McCranie v. United States*, 199 F. 2d 581, cert. den. (1952), it has been held that members of a State National Guard, who are not in active military service, are not federal employees. There appears no reasonable grounds for making an exception in case of a member designated as a "unit caretaker."

Again, it should be borne in mind that Sergeant Brown was not only engaged on a trip ordered and

directed by the Adjutant General of the State of Washington, but the vehicle he was operating was one the possession of which had been transferred to the Washington National Guard. This transfer of possession and control to the Washington National Guard in effect constituted a bailment.

In order to observe the Congressional estimate of the status of Reserve and National Guard Forces of the Armed Services, we refer to the Report of the Interim Subcommittee on Preparedness of the Committee on Armed Services, United States Senate, under authority of Senate Resolution 86 (83rd Congress), as submitted by Senator Saltonstall, Chairman, which report at page eleven thereof, with reference to the Air National Guard, reads:

“Each wing has permanent personnel who administer the program and maintain the equipment. They are State employees paid with Federal funds. There are 7,000 men presently in this category. These men are also members of the guard, go with the units when called to active duty, and augment and facilitate the training program to a considerable extent.”

Summary

The rationale of the decisions in the three cases which held that the National Guard unit caretaker is an employee of the United States, rather than the State in which he is employed, is not in accord with the large body of administrative law and decisions pertaining thereto. The position taken by

the Government in this memorandum is as follows:

1. National Guard unit caretakers are not Federal employees, inasmuch as every Federal administrative agency having occasion to deal with the problem, with but one exception, has held that they are State employees;

2. Although authorized by Federal statute, the caretaker is hired and fired by State authorities, subject only to approval by the Secretary of the Army;

3. The Courts of the several States though never presented with the exact problem, have consistently recognized and emphasized that guardsmen and employees of the National Guard are essentially State employees;

4. It is a demonstrable non sequitur to state that because of the regulatory powers exercised by the Department of the Army and Air Force and the National Guard Bureau over the caretaker he is a federal employee, although the guardsman himself is not a federal employee;

5. The background, both legally and historically, of the National Guard supports the position here advocated;

6. The Congressional purpose in providing funds for the employment of the caretaker was to assure the federal property loaned to the State would be properly cared for rather than evidencing an intention to create an "office" or "position" federal in character;

7. The legislative history of the caretaker clearly

indicated he has always been considered a State employee by the Federal Government;

8. The National Guard Bureau, the Department of the Air Force, and the Department of the Army, the regulations of which were relied upon by the Holly Court, have never considered that the unit caretaker was a federal employee;

9. The caretaker cannot be considered a federal employee inasmuch as he is not employed by a federal agency, and his employment is not characterized by any of the indicia of federal employment.

In summation, when the position and duties of the caretaker are analyzed in detail and in the fullest sense, it will be seen that his primary relationship is to the State, rather than to the United States. His duty to protect the property assigned to his unit is primarily concerned with protecting the State from liability for loss or destruction of this property. If the property remained in federal custody, why should the State be liable? The State is responsible for the equipment and other material loaned to it and must account for all property received from the United States, otherwise it must pay the loss. In protecting the State, and as a practical matter, the caretaker is told what to do, where to go, and how to do it by State authorities, and not by representatives of the Federal Government. The control thus vested in the State is that which traditionally and legally establishes the relationship of employer-employee.

In addition to the foregoing, it is the defendant's contention, Article 1, Sec. 8, Clause 16, which grants the authority and power to Congress:

“To provide for organizing, arming, and disciplining the Militia, and for governing such part of them as may be employed in the Service of the United States, reserving to the States, respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline Prescribed by Congress,”

does not authorize Congress to appoint officers of the National Guard, nor take from the President of the United States the power to appoint all Officers of the United States (Article 2, Sec. 2), nor place within the power of the Judiciary or the Congress the right to create and establish a federal office within the Structure of a State National Guard.

See U. S. v. Dern, *supra*.

Respectfully submitted,

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ GUY A. B. DOVELL,
Assistant United States
Attorney.

[Endorsed]: Filed Sept. 24, 1954.

United States District Court, Western District of
Washington, Southern Division

No. 1747

MAR-LE WENDT and ALBERT D. ROSEL-
LINI,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant,

and

MAR-LE WENDT and ALBERT D. ROSEL-
LINI,

Plaintiffs,

vs.

PACIFIC TELEPHONE & TELEGRAPH COM-
PANY, a Corporation,

Defendant.

ORDER OF CONSOLIDATION

The parties in the above-entitled actions having by oral stipulation in open court on the 4th day of October, 1954, agreed that the above-entitled actions should be consolidated for purposes of trial and appeal, now, therefore, it is hereby

Ordered that the above-entitled actions be and the same are hereby consolidated for purposes of trial and appeal.

Done in Open Court this 19th day of October,
1954.

/s/ GEO. H. BOLDT,
Judge.

Presented by:

/s/ GUY A. B. DOVELL,
Assistant United States Attorney, Attorneys for
Defendant United States of America.

Approved for entry:

/s/ M. E. CASEY,
Of Rosellini & Casey, At-
torneys for Plaintiffs.

/s/ DONALD D. MacLEAN,
Of Attorneys for Defendant Pacific Telephone and
Telegraph Company.

[Endorsed]: Filed Oct. 19, 1954.

[Title of District Court and Cause.]

Nos. 1758 and 1747

PRE-TRIAL ORDER

As a result of a pre-trial conference held on the 1st day of April, 1955, plaintiffs, being represented by Merwin E. Casey of Casey & Pruzan, defendant United States of America being represented by Guy A. B. Dovell, assistant United States Attorney,

defendant Pacific Telephone & Telegraph Company being represented by McMicken, Rupp & Schweppe, the following issues of fact and law were framed and exhibits identified:

Admitted Facts

1. That at all times herein mentioned plaintiff Mar-Le Wendt was a married woman living separate and apart from her husband, and was a citizen of the State of Washington and of the United States, residing within the above-described judicial district; that all acts and omissions to act herein complained of took place in the above-judicial district.

2. That at all times herein mentioned plaintiff Albert D. Rosellini was a citizen of the State of Washington and of the United States, residing within the above-described judicial district, and was at all times herein mentioned the owner of a certain 1950 Nash sedan automobile. That all acts and omissions to act complained of took place in the above-described judicial district.

3. That defendant Pacific Telephone and Telegraph Company is a corporation duly organized and existing under and by virtue of the laws of the State of California, authorized to transact business and transacting business in the State of Washington and in the above-described Judicial District. That the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

4. That at all times herein mentioned there was

in force that Traffic Code of the City of Tacoma, Washington, Ordinance No. 11701, entitled:

“An ordinance regulating travel and traffic on the streets of the City of Tacoma; providing a penalty for the violation thereof; repealing ordinances 10598, 11054, 11385, and 11617, and all ordinances and parts of ordinances in conflict herewith, and declaring that this ordinance shall take effect immediately after publication.”

which was signed by the Mayor of Tacoma on June 14, 1939, and became effective on June 26, 1939. Said Traffic Code is contained in a pamphlet designated, “Tacoma Traffic Code, Ordinance 11701, as Amended to June 16, 1952.”

5. That at all times herein mentioned there was in force an Ordinance of the City of Tacoma, Washington, Ordinance No. 12947, entitled:

“An Ordinance relating to and regulating the obstruction of streets, alleys and public places of the City of Tacoma, providing penalties for the violation thereof and repealing Ordinances Nos. 2239, 3257, and 9895.”

signed by the Mayor of Tacoma on October 9, 1946, and became effective October 21, 1946, which Ordinance was amended by Ordinance No. 14124, passed by the City Council of Tacoma on March 14, 1951, published March 15, 1951.

6. That plaintiff Mar-Le Wendt was the driver and sole occupant of said Nash automobile.

7. That on March 11, 1953, William L. Brown, Serial No. 28994242, was a sergeant in Battery C, 770th AAA Battalion, State of Washington National Guard, stationed at Seattle, Washington. That he was paid therefor \$6.18 per drill, on a quarterly basis, by check issued by the United States Army Finance Center, Seattle. That on said date, Brown was also a full-time civilian "Administrative, Supply and Maintenance Technician" in Battery C, 770th AAA Battalion, having been so appointed by Par. 2, Special Order 286, Headquarters Military Department, State of Washington, Office of the Adjutant General, dated October 12, 1952, effective October 16, 1952. That he was paid therefor \$3,695.70 annually, on a monthly basis, by check issued by the United States Army Finance Center, Seattle, from funds separate from those received as a member of the National Guard.

8. That all acts referred to as having been done by William L. Brown were done by him under the authority of and strictly in accordance with Paragraph 3, Special Order 67, Headquarters Military Department, State of Washington, Office of the Adjutant General, Camp Murray, Washington. That said Special Order was directed to said Brown as Unit Material Caretaker in said Battery C.

9. That by virtue of Departments of the Army and the Air Force National Guard Bureau, Washington 25, D. C., NG-ARPC 231 General, dated December 22, 1952, subject: Revised Field Civilian Personnel Program—Project 1213, directed to the

Adjutants General of all States, Alaska, Hawaii, Puerto Rico and the District of Columbia, the title of "Unit Materiel Caretaker" or "Unit Caretaker" was changed to "Administrative, Supply and Maintenance Technician," and qualifications and job specifications were set forth. That said publication was in full force and effect on March 11, 1953.

10. That on March 11, 1953, Brown drove a National Guard vehicle to Camp Murray for the purpose of transporting vehicles and supplies from Camp Murray to Battery C in Seattle.

11. That upon arrival at Camp Murray on March 11, 1953, Brown took delivery of and receipted for one truck, cargo, two and one-half ton, 6 x 6, M 211, U. S. A. No. 41188153, with equipment, and prepared to return to said Battery C in Seattle, Washington. That at the same time and place, one Stanley DeArment, Administrative Supply and Maintenance Technician for Battery B, 770th AAA Gun Battalion, Washington National Guard, stationed at Seattle, Washington, took delivery of one M 9A2 Director, mounted on a M 7 generator trailer, U. S. A. No. 055109, and one quarter-ton 4 x 4 utility M 3 8A1 truck, U. S. A. No. 20961521. That said quarter-ton truck was loaded into the rear of the said two and one-half-ton truck and that the said M 7 generator trailer, U. S. A. No. 055109, was attached to the rear of said two and one-half-ton truck by a standard coupling fastening. That said two and one-half-ton truck and said generator trailer were each equipped

with electrical brake connections but that the voltage and size of the connections were different and could not be attached together. That the electrical equipment on the two and one-half-ton truck was 12 volt and that the electrical equipment on the generator trailer was 6 volt. That in order to connect the two, it was necessary to use a conversion kit which had not been made available to the National Guard by the Department of the Army.

12. That at about 11:45 a.m. on March 11, 1953, Brown was returning to said Battery C, driving said truck and pulling said trailer in a northerly direction on U. S. 99, approaching the south city limits of Tacoma, Washington. That as Brown approached the point of impact with plaintiffs' vehicle, he applied his brakes and the trailer pushed the rear end of the truck to the east so that the front end of the truck swung to the west and crossed into the southbound traffic lanes of U. S. 99, striking the left side of the southbound plaintiff's vehicle.

13. That at and prior to the time of said collision, the M 7 generator trailer, U. S. A. No. 055109, weighed 8,100 pounds and was not equipped with any brakes that could be applied by the driver of the towing truck from its cab.

14. That Section 26 (3), Ordinance No. 11701 of the traffic code of the City of Tacoma, Washington, on March 11, 1953, provided:

“Every trailer or semi-trailer of a gross weight, including load, of 2,000 pounds or more, when operated upon the public highways of the

City of Tacoma, shall be equipped with brakes adequate to control the movement of and to stop and to hold such vehicle and so designed as to be applied by the driver of the towing motor vehicle from its cab.”

15. That the Revised Code of Washington, Section 46.36.020, Laws of 1937, Chapter 189, Paragraph 34, in effect on March 11, 1953, provides in part:

“Every trailer or semi-trailer of a gross weight, including load, of 2,000 pounds or more, when operated upon a public highway, shall be equipped with brakes adequate to hold the movement of and to stop and to hold such vehicle and so designed as to be applied by the driver of the towing motor vehicle from its cab.”

16. That the truck and trailer and equipment carried therein at the time of the accident was owned by the United States of America and was on loan to the National Guard for the purpose of training personnel and transporting equipment and personnel of the National Guard. That in the event of obsolescence or wearing out of said equipment, or in the event of an emergency requiring its use by the United States of America, the United States of America could demand the immediate return of said equipment from the National Guard.

17. That the following incomplete list of bills are for care and treatment to plaintiff Mar-Le Wendt that was necessitated by injuries received

by said plaintiff in the accident complained of and that the amounts thereof are reasonable. That said bills may be admitted into evidence without further proof:

(a)	J. L. Ash, M.D.....	10.00
(b)	Laurel Rae Foxworthy, M.D.....	15.00
(c)	Tacoma General Hospital.....	12.00
(d)	Homer W. Humiston.....	5.00
(e)	Frank P. Mathews, M.D.....	72.00
(f)	Clintworth Optical Dispensary....	65.56
(g)	St. Joseph's Hospital.....	84.35
(h)	W. Howard Pratt, M.D.....	40.00
(i)	A. E. Morrison, M.D.....	15.00
(j)	Arthur M. Torrie, M.D.....	50.00

18. That at the time and place of said collision, defendant Pacific Telephone and Telegraph Company's employees were rodding underground conduit through a manhole in a portion of the north-bound traffic lanes of U. S. 99 some distance north of the point of impact. That three of said defendant's trucks were in said street. That said defendant had placed certain warning devices in said street some time prior to said collision.

19. That as a direct and proximate result of the collision between the military truck and plaintiff's vehicle, plaintiff Mar-Le Wendt sustained physical injuries, physical and mental pain, disability, and incurred medical expenses and other losses.

20. That as a direct and proximate result of said collision, plaintiff Albert D. Rosellini's 1950 Nash

sedan automobile was damaged in the sum of \$1,392.93.

21. That at all times herein mentioned the 770th AAA Battalion, Washington National Guard, including Battery C thereof, was Federally recognized and not in the Active Federal Military Services.

Plaintiffs' Contentions

1. That Brown was negligent in operating said truck and trailer without brake connections between them.

2. That Brown was negligent in failing to maintain a proper or any lookout for other users of the highway and in particular the warning devices placed in the highway by defendant Pacific Telephone and Telegraph Company.

3. That Brown was negligent in operating said truck and trailer at a rate of speed greater than was reasonable and proper under the conditions existing at the point of operation.

4. That Brown was the agent, servant and employee of defendant United States of America, acting within the scope and course of his employment at the time of the accident.

5. That even if Brown was not the agent, servant and employee of defendant United States of America acting within the scope and course of his employment, defendant United States of America was negligent in furnishing to and permitting the operation by the National Guard, on the public highways of the State of Washington, of the truck

and trailer without brake connections between them.

6. That defendant Pacific Telephone and Telegraph Company was negligent in failing to erect and maintain sufficient and adequate warnings, signs and signals a sufficient distance south of the point of their operations.

7. That each of the acts of negligence alleged hereinabove were direct and proximate causes of plaintiff's injury and damage.

8. That as to defendant United States of America, this action arises under the Act of June 25, 1948, 62 Stat. 933, 937; U.S.C. Title 28, Sections 1346 (b), 1402 (b).

9. That plaintiff Mar-Le Wendt has been damaged in the sum of \$200,000.00, as the result of severe and permanent physical injuries, physical and mental pain, expenditures for medical treatment and other losses.

10. That each of the acts of negligence alleged were in violation of the Statutes of the State of Washington and Ordinances of the City of Tacoma.

Contentions of Defendant
United States of America

1. That Sergeant Brown, acting in his capacity as Unit Caretaker of Battery C, 770th AAA Battalion, Washington National Guard, was a civilian employee of the State of Washington, appointed to and serving in his position pursuant to the laws and regulations of the State of Washington; and that at all times and in connection with all his

activities mentioned herein, he was subject to the sole direction and control of the State of Washington; and that in no way did he act as agent, servant or other employee of or under the direction or control of the United States.

2. That even though William L. Brown acted in compliance with standards and regulations promulgated and provided by the United States, such standards and regulations had been adopted by the State of Washington and made a part of the Guard regulations of said State. Such regulations having once been adopted by the State become effective and are enforced solely under the authority and sovereign power of the State of Washington; the United States having obtained by such adoption no power or authority to direct or control their enforcement with respect to personnel or employees of the state guard.

3. That the issuance of military property belonging to or loaned to the State of Washington by the United States is prohibited by the laws of the State of Washington to other than persons or organizations belonging to the State Militia and for purposes other than the requirements of that service. RCW-Title 38, Sec. 38.12.020, pars. (8) and (9).

4. That if the plaintiffs, or either of them, sustained any injuries or damages because of said accident, the same were not caused by reason of any act, omission or negligence on the part of defendant United States of America or on the part of William L. Brown, the driver of the National Guard truck, but were directly and proximately

caused and due to the negligent acts and omissions of defendant Pacific Telephone & Telegraph Company, its agent, servants and employees in failing to erect and maintain proper, sufficient and adequate warnings, signs and signals, under the circumstances and conditions then and there existing, a sufficient distance south of the point of their operations upon and under the public thoroughfare and in the right of way of the National Guard truck and other vehicles lawfully proceeding northward on said highway.

Contentions of Defendant

Pacific Telephone and Telegraph Company

1. That adequate signs, signals and warnings were placed a sufficient distance south of the point of repairs to warn oncoming traffic of the existence of said repairs, and to allow northbound traffic a sufficient time to slow down and to change lines of traffic.

2. That even if said defendant had placed no signs or warning devices in or near said highway, U. S. 99, said defendant's telephone truck standing in the east traffic lane of said highway was plainly visible to drivers of northbound vehicles, including said Brown, and in itself constituted sufficient notice of its presence.

3. That even if defendant Pacific Telephone and Telegraph Company was negligent, such negligence was not a proximate cause of plaintiffs' damage.

Issues of Fact and Law

That the issues of Fact and Law are set forth in the respective contentions of the parties, as stated in "Contentions."

Exhibits

The following exhibits were produced and identified and may be received in evidence pursuant to stipulation herein without further authentication or proof, it being admitted that each is what it purports to be:

Plaintiffs' Exhibits:

1. Photograph of truck and trailer.
2. Photograph of truck and trailer.
3. Photograph of plaintiff automobile.
4. Photograph of plaintiff automobile.
5. Photograph of plaintiff automobile.
6. Photograph of plaintiff automobile.
7. Certified true copy of State of Washington Department of Licenses certificate of weight of defendant United States of America truck and trailer.
8. Photostatic copy of army shipping document for two and one-half-ton truck.
9. Photostatic copy of army shipping document for quarter-ton truck.
10. Photostatic copy of War Department shipping document for M 7 generator trailer.
11. Photostatic copy of army shipping document for director.
12. Photostatic copy of issue slip for two and one-half-ton truck with equipment.

13. Photostatic copy of issue slip for quarter-ton truck.

14. Photostatic copy of issue slip for director.

15. Photostatic copy (13) sheets of special orders.

16. Mimeographed copy of Revised Field Civilian Personnel Program—Project 1213, dated 22 December, 1952, consisting of 17 pages.

Defendant United States of America's Exhibits:

1. Photostatic copy (9 sheets) of insurance documents and related correspondence.

That as to Defendant United States of America's Exhibits marked for identification as 2 through 6, inclusive, it is stipulated that they are what they purport to be and as to the portions admissible, if any, may be admitted without further proof, to wit:

2. Certified copy of Army Regulations, Special Regulations, War Department Circular No. 34, and a General Order, on file in the office of the Adjutant General, Department of the Army, Washington 25, D. C.

3. Certified copy NGR, official publications of the Department of the Army, now in custody, National Guard Bureau, Department of the Army.

4. Certified copy NGR Circulars, now on file, N. G. Bureau.

5. Cert. Copy, Annual Report, Chief, National Guard Bureau, on file, N. G. Bureau, ending June, 1949.

6. Certified Copy, Annual Report, Chief, Na-

tional Guard Bureau, on file, N. G. Bureau, ending 30 June, 1951.

Conclusions

The foregoing Pre-trial Order has been approved by the parties hereto as evidenced by the signatures of their counsel hereon, and the order is hereby entered as the result of which all pleadings pass out of the case, and this Pre-trial Order shall not be amended except by agreement of the parties or upon order of the Court.

Done in Open Court this 8th day of April, 1955.

/s/ GEO. H. BOLDT,
District Judge.

Approved:

/s/ M. E. CASEY,
Of Attorneys for Plaintiffs.

/s/ GUY A. B. DOVELL,
Assistant United States Attorney, for Defendant
United States of America.

/s/ DONALD D. MacLEAN,
Of Attorneys for Defendant Pacific Telephone and
Telegraph Company.

[Endorsed]: Filed April 8, 1955.

[Title of District Court and Cause.]

Nos. 1747 and 1758

COURT'S ORAL OPINION

[Designated Portion]

April 14, 1955

* * *

Now we come down to the matter of concluding the liability phase of it and I will just simply say this, that I recognize that there is very serious substance to the argument that Mr. Dovell makes, far from frivolous, but I am inclined on the whole to go along with what has been held in the Tenth and Fifth Circuits notwithstanding the fact that it may be that those two cases, that the Courts in those two cases acted without jurisdiction. Certainly they did act without jurisdiction if the unit caretaker was not an employee and acting within the scope of his employment because that is made a condition of federal jurisdiction. And it is a little hard for me to assume that two so exalted Courts, such exalted Courts as the Tenth and Fifth Circuits would have made that egregious error so I am going to find and hold that the caretaker was within the course and scope of his employment and I am further going to find and hold that it was negligence on the part of the officer in charge of this property in releasing it onto the highway knowing it was going to be driven on the highway without brakes in violation of state law.

* * *

[Endorsed]: Filed May 27, 1955.

[Title of District Court and Cause.]

Nos. 1747 and 1758

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Matter coming on for trial before the undersigned Judge of the above-entitled court, sitting without a jury, on the 11th day of April, 1955, plaintiffs being represented by their attorneys, Casey & Pruzan, Merwin E. Casey of counsel; Defendant United States of America being represented by Charles P. Moriarty, United States Attorney, Guy A. B. Dovell, Assistant United States Attorney; Defendant Pacific Telephone & Telegraph Company being represented by McMicken, Rupp & Schweppe, John Rupp and Donald MacLean of counsel, witnesses having been sworn and testified and evidence and exhibits having been introduced, and the court being fully advised, the court now makes the following:

Findings of Fact

I.

That at all times herein mentioned plaintiff Mar-Le Wendt was a married woman living separate and apart from her husband, and was a citizen of the State of Washington and of the United States, residing within the above-described judicial district; that all acts and omissions to act herein complained of took place in the above judicial district.

II.

That at all times herein mentioned plaintiff Albert D. Rosellini was a citizen of the State of Washington and of the United States, residing within the above-described judicial district, and was at all times herein mentioned the owner of a certain 1950 Nash sedan automobile. That all acts and omissions to act complained of took place in the above-described judicial district.

III.

That defendant Pacific Telephone and Telegraph Company is a corporation duly organized and existing under and by virtue of the laws of the State of California, authorized to transact business and transacting business in the State of Washington and in the above-described Judicial District. That the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

IV.

That at all times herein mentioned there was in force that Traffic Code of the City of Tacoma, Washington, Ordinance No. 11701, entitled:

“An ordinance regulating travel and traffic on the streets of the City of Tacoma; providing a penalty for the violation thereof; repealing ordinances 10598, 11054, 11385, and 11617, and all ordinances and parts of ordinances in conflict herewith, and declaring that this ordinance shall take effect immediately after publication.”

which was signed by the Mayor of Tacoma on June 14, 1939, and became effective on June 26, 1939. Said Traffic Code is contained in a pamphlet designated, "Tacoma Traffic Code, Ordinance 11701, as amended to June 16, 1952."

V.

That at all times herein mentioned there was in force an Ordinance of the City of Tacoma, Washington, Ordinance No. 12947, entitled:

"An Ordinance relating to and regulating the obstruction of streets, alleys and public places of the City of Tacoma, providing penalties for the violation thereof and repealing Ordinances Nos. 2239, 3257, and 9895."

signed by the Mayor of Tacoma on October 9, 1946, and became effective October 21, 1946, which Ordinance was amended by Ordinance No. 14124, passed by the City Council of Tacoma on March 14, 1951, published March 15, 1951.

VI.

That plaintiff Mar-Le Wendt was the driver and sole occupant of said Nash automobile.

VII.

That on March 11, 1953, William L. Brown, Serial No. 28994242, was a sergeant in Battery C, 770th AAA Battalion, State of Washington National Guard, stationed at Seattle, Washington. That he was paid therefor \$6.18 per drill, on a quarterly basis, by check issued by the United States Army Finance Center, Seattle. That on said date, Brown was also a full-time civilian "Ad-

ministrative, Supply and Maintenance Technician" in Battery C, 770th AAA Battalion, having been so appointed by Par. 2, Special Order 286, Headquarters Military Department, State of Washington, Office of the Adjutant General, dated October 12, 1952, effective October 16, 1952. That he was paid therefor \$3,695.70 annually, on a monthly basis, by check issued by the United States Army Finance Center, Seattle, from funds separate from those received as a member of the National Guard. That the primary duties of Brown as Administrative, Supply and Maintenance Technician included receipting for and taking delivery of material and equipment at Camp Murray, Washington, and returning it to the 770th AAA Battalion in Seattle, Washington.

VIII.

That all acts referred to as having been done by William L. Brown were done by him under the authority of and strictly in accordance with Paragraph 3, Special Order 67, Headquarters Military Department, State of Washington, Office of the Adjutant General, Camp Murray, Washington. That said Special Order was directed to said Brown as Unit Materiel Caretaker in said Battery C.

IX.

That by virtue of Departments of the Army and the Air Force National Guard Bureau, Washington 25, D. C., NG-ARPC 231 General, dated December 22, 1952, subject: Revised Field Civilian Personnel Program, Project 1213, directed to the Adjutants General of all States, Alaska, Hawaii,

Puerto Rico and the District of Columbia, the title of "Unit Materiel Caretaker" or "Unit Caretaker" was changed to "Administrative, Supply and Maintenance Technician," and qualifications and job specifications were set forth. That said publication was in full force and effect on March 11, 1953.

X.

That on March 11, 1953, Brown drove a National Guard vehicle to Camp Murray for the purpose of transporting vehicles and supplies from Camp Murray to Battery C in Seattle.

XI.

That upon arrival at Camp Murray on March 11, 1953, Brown took delivery of and receipted for one truck, cargo, two and one-half ton, 6 x 6, M 211, U. S. A. No. 41188153, with equipment, and prepared to return to said Battery C in Seattle, Washington. That at the same time and place, one Stanley DeArment, Administrative, Supply and Maintenance Technician for Battery B, 770th AAA Gun Battalion, Washington National Guard, stationed at Seattle, Washington, took delivery of one M 9A2 Director, mounted on an M 7 generator trailer U. S. A. No. 055109, and one quarter-ton 4 x 4 utility M 3 8A1 truck, U. S. A. No. 20961521. That said quarter-ton truck was loaded into the rear of the said two and one-half-ton truck and that the said M 7 generator trailer, U. S. A. No. 055109, was attached to the rear of said two and one-half-ton truck by a standard coupling fastening. That said two and one-half-ton truck and said generator

trailer were each equipped with electrical brake connections but that the voltage and size of the connections were different and could not be attached together. That the electrical equipment on the two and one-half-ton truck was 12 volt and that the electrical equipment on the generator trailer was 6 volt. That in order to connect the two, it was necessary to use a conversion kit which had not been made available to the National Guard by the Department of the Army.

XII.

That at about 11:45 a.m. on March 11, 1953, Brown was returning to said Battery C, driving said truck and pulling said trailer in a northerly direction on U. S. 99, approaching the south city limits of Tacoma, Washington. That as Brown approached the point of impact with plaintiffs' vehicle, he applied his brakes and the trailer pushed the rear end of the truck to the east so that the front end of the truck swung to the west and crossed into the southbound traffic lanes of U. S. 99, striking the left side of the southbound plaintiff's vehicle. That the pavement was wet and slippery and that the truck was proceeding at over 20 miles per hour.

XIII.

That at and prior to the time of said collision, the M 7 generator trailer, U. S. A. No. 055109, weighed 8,100 pounds and was not equipped with any brakes that could be applied by the driver of the towing truck from its cab.

XIV.

That section 26 (3), Ordinance No. 11701 of the traffic code of the City of Tacoma, Washington, on March 11, 1953, provided:

“Every trailer or semi-trailer of a gross weight, including load, of 2,000 pounds or more, when operated upon the public highways of the City of Tacoma, shall be equipped with brakes adequate to control the movement of and to stop and to hold such vehicle and so designed as to be applied by the driver of the towing motor vehicle from its cab.”

XV.

That the Revised Code of Washington, Section 46.36.020, Laws of 1937, Chapter 189, Paragraph 34, in effect on March 11, 1953, provides in part:

“Every trailer or semi-trailer of a gross weight, including load, of 2,000 pounds or more, when operated upon a public highway shall be equipped with brakes adequate to hold the movement of and to stop and to hold such vehicle and so designed as to be applied by the driver of the towing motor vehicle from its cab.”

XVI.

That the truck and trailer and equipment carried therein at the time of the accident were owned by the United States of America and were on loan to the National Guard for the purpose of training

personnel and transporting equipment and personnel of the National Guard. That in the event of obsolescence or wearing out of said equipment, or in the event of an emergency requiring its use by the United States of America, the United States of America could demand the immediate return of said equipment from the National Guard.

XVII.

That at all times herein mentioned the 770th AAA Battalion, Washington National Guard, including Battery C thereof, was Federally recognized and not in the Active Federal Military Services.

XVIII.

That at the time of the collision, defendant The Pacific Telephone and Telegraph Company had a crew of men and three trucks working on said defendant's underground facilities on South Tacoma Way inside the city limits of the City of Tacoma, Washington. The most southerly of the three trucks was located approximately 200 feet north of the south city limits of said city. The truck was parked in the northbound curb or outside lane of traffic, facing in a southerly direction, backed up to a manhole in the street. Another truck was parked in the same lane, backed up to and on the opposite side of the same manhole, facing north. The third truck was some considerable distance north of the manhole. The northbound inside traffic lane on South Tacoma Way was not obstructed and was free for the use of northbound vehicular traffic.

XIX.

Defendant The Pacific Telephone and Telegraph Company had placed in the street, and on the trucks, warning signs, flags and signals designed to warn all traffic, including northbound traffic, of the presence of said trucks. Said warning signs and signals were conspicuously placed. In particular, there were placed on the street, in the outside traffic lane, two "Men Working" signs south of the most southerly truck. One of these "Men Working" signs was placed approximately 12 feet south of this truck. The second sign was considerably south, a distance of approximately 171 feet south of the southernmost truck, and this sign and the trucks standing in the street were visible to traffic approaching from the south from a distance of several hundred feet south of this most southerly sign.

XX.

That on and prior to the day of the collision, Albert G. Hagen was a Lt. Colonel on active duty as an officer in the employment and service of the Army of the United States in the Ordnance Branch, detailed as United States Property and Fiscal Officer to the Washington National Guard at Camp Murray, Washington. That he wore the insignia of the National Guard Bureau. That he replied to Plaintiffs' subpoena by an order from the Judge Advocate General's Department of the United States Army, based on an Army Regulation, ordering him not to testify. That this order was later rescinded by the United States. That prior

to delivery of the 2½-ton truck and M7 Generator Trailer to Brown, Colonel Hagen knew that said truck would pull said loaded trailer from Camp Murray to Seattle over the public highways of the State of Washington, and that because of the different voltage systems on the truck and trailer, there were no brakes on said trailer capable of being operated from the truck cab. That Colonel Hagen nevertheless authorized and directed that said truck and trailer be issued to Brown.

XXI.

That Plaintiff Mar-Le Wendt incurred medical expenditures of the reasonable amount of \$6,404.75 for treatment of injuries incurred in the accident, which injuries consisted of the following: Multiple rib fractures on the left side; crushed chest; multiple fractures of the pelvis; multiple abrasions and contusions; cerebral concussion; sub-dural hygroma over the right side of the brain; frontal lobe brain damage. That subsequent to said accident a bi-temporal craniotomy was performed and the sub-dural spaces were drained of fluid that had formed as a result of the injuries suffered in said accident. That she has suffered permanent sub-cortical and frontal lobe brain damage and personality change, affecting the portion of the brain controlling memory, association, judgment, personality and the higher intellectual functions, and has received permanent disfiguring scars and permanent damage to the use and function of her pelvis.

XXII.

That plaintiff Albert D. Rosellini's 1950 Nash sedan automobile was damaged in the sum of \$1,392.93 as a direct and proximate result of the collision.

From the foregoing Findings of Fact, the Court makes the following:

Conclusions of Law

I.

That Sergeant William L. Brown was at all times the agent, servant and employee of defendant United States of America, acting within the scope of his office and employment as an Administrative, Supply and Maintenance Technician.

II.

That Sergeant William L. Brown did not exercise due care and was negligent in the following particulars: In operating the truck and trailer on the public highway of the State of Washington without brake connections to said trailer that could be applied from the cab of the towing truck; in operating said truck and trailer at a rate of speed greater than was reasonable and proper under the conditions existing at the point of operation; in failing to maintain a proper or any lookout for and in failing to timely see the warning devices placed in the highway by defendant The Pacific Telephone and Telegraph Company.

III.

That Lt. Colonel Albert G. Hagen was at all times the agent, servant and employee of defendant United States of America, acting within the scope of his office and employment as United States Property and Fiscal Officer in authorizing the issuance to Sergeant William L. Brown of the truck and trailer.

IV.

That Lt. Colonel Albert G. Hagen did not exercise due care and was negligent in authorizing the issuance to Sergeant William L. Brown of the truck and trailer, knowing that said truck and trailer would be operated on the public highway of the State of Washington and knowing that the operation of said truck and trailer together on the public highway of the State of Washington was illegal.

V.

That the aforesaid acts of negligence of Sergeant Brown and Lt. Colonel Hagen were the direct, proximate causes of the collision and the injuries and damages sustained by Plaintiffs. That neither plaintiff was guilty of contributory negligence.

VI.

That as to defendant United States of America this action arises and this court has jurisdiction under the Act of June 25, 1948, 62 Stat. 933, 937; U.S.C. Title 28, Sections 1346 (b) and 1402 (b).

VII.

That Defendant United States of America, if a private party, would be liable to Plaintiffs in accordance with the laws of the State of Washington and ordinances of the City of Tacoma.

VIII.

That defendant The Pacific Telephone and Telegraph Company was a public utility and a public service company and had an important duty to render efficient telephone and telegraph service to its subscribers and the general public, and to maintain its facilities in efficient working condition. That said defendant had a duty in maintaining its facilities to use reasonable and ordinary care to see that any obstruction of the public highway necessitated by such maintenance did not create a hazard to the users of such public highway.

IX.

That precautions taken by defendant The Pacific Telephone and Telegraph Company fulfilled the duty of ordinary and reasonable care and said defendant was not guilty of any negligence. The acts and conduct of said defendant were a mere condition and not a cause of said collision.

X.

That judgment should be awarded against defendant United States of America in favor of plaintiff Mar-Le Wendt in the sum of \$56,404.75, and in favor of plaintiff Albert D. Rosellini in the sum of \$1,392.93, together with their statutory costs.

Done in Open Court this 7th day of December,
1955.

/s/ GEO. H. BOLDT,
District Judge.

Presented by:

/s/ M. E. CASEY,
Of Attorneys for Plaintiffs.

Approved for entry and Notice of Presentation
Waived:

/s/ JOHN N. RUPP,
Of Attorneys for Defendant The Pacific Telephone
& Telegraph Company.

Copy Received:

/s/ GUY A. B. DOVELL,
For Defendant United States
of America.

[Endorsed]: Lodged Nov. 10, 1955.

[Endorsed]: Filed Nov. 7, 1955.

United States District Court, Western District
of Washington, Southern Division

Nos. 1747 and 1758

MAR-LE WENDT and ALBERT D. ROSEL-
LINI,

Plaintiffs,

vs.

PACIFIC TELEPHONE & TELEGRAPH
COMPANY, a Corporation,

Defendant,

and

MAR-LE WENDT and ALBERT D. ROSEL-
LINI,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This Matter coming on for trial before under-
signed Judge of the above-entitled Court sitting
without jury on the 11th day of April, 1955, plain-
tiffs being represented by their attorneys, Casey
& Pruzan, Merwin E. Casey of counsel; defendant
United States of America being represented by
Charles P. Moriarty, United States Attorney, of
counsel, defendant The Pacific Telephone and Tele-
graph Company being represented by McMicken,
Rupp & Schweppe, John Rupp and Donald Mac-

Lean of counsel, witnesses having been sworn and testified and evidence and exhibits having been introduced, and the Court having entered its Findings of Fact and Conclusions of Law, now therefore,

It Is Ordered that plaintiff Mar-Le Wendt have judgment against defendant United States of America for the sum of \$56,404.75, together with her statutory costs herein to be taxed.

It Is Further Ordered that plaintiff Albert D. Rosellini have judgment against defendant United States of America for the sum of \$1,392.33, together with his statutory costs herein to be taxed.

It Is Further Ordered that plaintiffs recover nothing against defendant The Pacific Telephone and Telegraph Company and that said defendant have and recover its costs against plaintiffs herein to be taxed.

Done in Open Court this 7th day of December, 1955.

/s/ GEO. H. BOLDT,
District Judge.

Presented by:

/s/ M. E. CASEY,
Of Attorneys for Plaintiffs.

Approved for entry and Notice of Presentation Waived:

/s/ JOHN N. RUPP,
Of Attorneys for Defendant, The Pacific Telephone & Telegraph Company.

Copy received:

/s/ GUY A. B. DOVELL,
For Defendant, United
States of America.

[Endorsed]: Lodged November 10, 1955.

[Endorsed]: Filed and entered Dec. 7, 1955.

[Title of District Court and Cause.]

Nos. 1747 and 1758

NOTICE OF APPEAL

Notice Is Hereby Given:

That the United States of America, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered on December 7, 1955, in the above-entitled actions, consolidated for purposes of trial and appeal.

/s/ CHARLES P. MORIARTY,
United States Attorney.

/s/ GUY A. B. DOVELL,
Asst. United States Attorney.

/s/ E. E. REDMAYNE,
Deputy Clerk.

[Copies mailed February 1, 1956.]

[Endorsed]: Filed February 1, 1956.

[Title of District Court and Cause.]

Nos. 1747 and 1758

DESIGNATION OF RECORD
ON APPEAL

Defendant, having filed its notice of appeal, hereby designates the record on appeal as follows:

The entire record in the District Court, including the pleadings, motions, orders, interrogatories and answers thereto, transcript of proceedings, all exhibits, findings of fact, conclusions of law, judgment, and notice of appeal.

CHARLES P. MORIARTY,
United States Attorney,

By /s/ GUY A. B. DOVELL,
Asst. United States Attorney.

Affidavit of service by mail attached.

[Endorsed]: Filed April 16, 1956.

In the District Court of the United States for the
Western District of Washington, Southern Division

Nos. 1747 and 1758

MAR-LE WENDT and ALBERT D. ROSEL-
LINI,

Plaintiffs,

vs.

PACIFIC TELEPHONE & TELEGRAPH
COMPANY, a Corporation,

Defendant.

MAR-LE WENDT and ALBERT D. ROSEL-
LINI,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

TRANSCRIPT AND TRIAL OF
PROCEEDINGS

[Designated Portions]

Before: George H. Boldt, United States District
Judge.

April 11, 1955—9:35 A.M.

LAWRENCE BROWN

being first duly sworn on oath, was called as a witness on behalf of the Plaintiffs and testified as follows:

Direct Examination

By Mr. Casey:

The Clerk: State your full name and spell your last name.

The Witness: Lawrence Brown, B-r-o-w-n.

Q. State your address, Mr. Brown.

A. 624 7th Avenue, Kirkland, Washington.

Q. By whom are you employed at the present time?

A. Battery A, 200 Washington National Guard.

Q. In what capacity are you working now?

A. Radar operator.

Q. Are you on active duty with the National Guard? A. No.

Q. Directing your attention to March 11th of 1953, on that date were you a member of the Washington National Guard? A. I was.

Q. What grade did you hold?

A. Master Sergeant.

Q. What was your serial number?

A. 28994242.

Q. On that date can you state whether the unit to [56*] which you were assigned was on active federal duty? A. It was not.

Q. Can you state whether it was a federally rec-

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Lawrence Brown.)

ognized unit? A. It was.

Q. Now as a sergeant in the Washington National Guard on that date did you go to meetings?

A. Yes, we did.

Q. How often were those meetings held and where were they held?

A. Once a week and they were held in the armory in Seattle.

Q. Now that was the 770 Field Battalion?

A. Anti-aircraft.

Q. Anti-aircraft Battalion? A. Yes.

Q. And was the armory in Seattle its assigned headquarters? A. Yes.

Q. What night of the week did you go to those meetings, if you recall?

A. I don't recall exactly, sir. It was either Tuesday or Monday.

Q. You are sure it was one of those two?

A. One of the two, I believe. [57]

Q. Now what hours did that take on Monday or Tuesday night? A. Two hours.

Q. From when to when?

A. Eight to ten.

Q. Did you wear your uniform to those meetings? A. We did.

Q. Were you required to wear uniforms to those meetings? A. We were.

Q. What pay did you receive as a sergeant in the Washington National Guard at that time?

A. It was the equivalent of one day's Army pay for equal rank.

(Testimony of Lawrence Brown.)

Q. And how often were you paid?

A. Every quarter.

Q. And where would that check come from?

A. From the Army Finance Center, Seattle.

Q. Now, on March 11th and prior to that of 1953, did you have any other employment?

A. I did.

Q. What was that?

A. I was a materiel caretaker for the National Guard.

Q. For what unit of the National Guard?

A. On March 11th it was Battery C. [58]

Q. Battery C? A. Yes, of 770th.

Q. How long had you been employed as a unit caretaker for Battery C of the 770th prior to March 11, 1953?

A. I believe since October. I am not quite sure of that.

Q. What days of the week did you work in that job?

A. Five days a week, Monday through Friday.

Q. And what were your hours of employment?

A. Eight to four-thirty.

Q. Did you do any overtime work on that job?

A. Occasionally.

Q. Were you paid for such overtime work?

A. No, we were not.

Q. How much pay did you receive as unit materiel caretaker? A. On that date?

Q. On that date.

The Court: You mean——

(Testimony of Lawrence Brown.)

Q. (Continuing): Not per day but in what manner were you paid? A. At that time?

Q. At that general time, yes.

The Court: During that period what was your rate of pay? [59]

Q. (Continuing): That is what I mean.

A. I believe it was around \$315 a month but I couldn't say for sure.

Q. Now, how often did you receive pay as materiel caretaker? A. Once a month.

Q. And where did that check come from?

A. United States Army Finance Center, Seattle.

Q. Did you know whether that check came from different funds than the quarterly check you received for being a member of the National Guard?

A. I can't say for sure.

The Court: Stipulated fact, says so.

Mr. Casey: Excuse me.

Q. Prior to your being a unit caretaker for Battery C of the 770th had you been a unit caretaker for any other units with the National Guard?

A. I had.

Q. Can you state what those units, approximately the periods of service that you were in that capacity with other units?

A. I had been a caretaker with the Clearing Co. of the 116th Medical Battalion located in Seattle.

Q. How long—what was the, approximately the first date when you became a materiel caretaker? [60]

(Testimony of Lawrence Brown.)

A. I think it was January 1st or 2nd, 1951.

Q. And were you with the Clearing Co. at that time? A. Yes.

Q. Did you know what your rate of pay was when you started out as a caretaker?

A. I believe it was around \$2,700 a year.

Q. Did you receive several promotions after that date? A. I did.

Q. Now, did you go directly from your duties as unit caretaker in this Clearing Co. to your duties as caretaker in Battery C of the 770th?

A. Yes, sir.

Q. When you were first hired as a unit caretaker in the Clearing Co. did anybody describe to you your duties in that position?

A. They did.

Q. Who was that?

A. The person by whom I was interviewed in Seattle and by the officer I was interviewed by at Camp Murray.

Q. By whom were you interviewed in Seattle?

A. By my future Company Commander and by the personnel officer.

Q. By whom were you interviewed in Camp Murray?

A. United States Property and Disbursing Officer. [61]

Q. Now the—do you recall the name of that man in 1951?

A. Col. Wilkins was the United States Property and Disbursing Officer, Col. Hagen was his

(Testimony of Lawrence Brown.)

assistant and he was the one who actually interviewed me.

Q. Col. Hagen? A. Yes.

Q. And Col. Hagen, I believe, is now the United States Property and Disbursing Officer at Camp Murray? A. He is.

Q. By the way, for the purpose of the record, what is Camp Murray?

A. That is the National Guard headquarters for the State of Washington.

Q. Now, when Col. Hagen interviewed you what was he? Was he a National Guard officer or regular Army officer?

A. At the time of the interview he was National Guard officer.

Q. What is the rank, if you know, of the United States Property and Disbursing Officer at Camp Murray?

A. I believe he holds federal recognition as a lieutenant colonel.

Q. Well, is he an officer on active duty with the United States Army?

A. I believe he is, sir. [62]

Q. Now, what did he tell you concerning your duties when you were hired in January of 1951?

A. Well, that my duties would consist mainly of care and maintenance of property and some administrative and supply work, transporting of supplies to Seattle.

Q. From where?

A. From Camp Murray, sir.

(Testimony of Lawrence Brown.)

Q. Did he tell you it was part of your duties to pick up equipment at Camp Murray being issued to your unit and take it to your unit?

A. I believe he did, sir, yes.

Q. Did your company commander in Battery C of the 770th ever assign to you any duties in addition to the duties you were originally advised you were to perform?

A. It is hard to say, sir. He might have at one time or another.

Q. Were you familiar on or prior to March, 1953, with the regulations applicable to hiring and duties of caretakers?

A. Somewhat, yes, sir.

Q. What was your understanding regarding those regulations as to whether your duties included—

Mr. Dovell: I am going to object to that, your Honor. The regulations should speak for themselves.

The Court: Yes, I think that is right, and what [63] this witness' understanding of them was wouldn't add anything to it.

Q. (Continuing): Where was the headquarters of the Clearing Co. for which you were caretaker prior to, with Battery C of 770th?

A. It was in Seattle, sir. It started at the armory, the new armory, Field Artillery Armory and later we moved to the old armory down on Western Avenue.

Q. Were your duties in Battery C substantially the same as your duties in the Clearing Co.?

(Testimony of Lawrence Brown.)

A. Yes, sir.

Q. Included—you perform the same functions?

A. Mostly yes, sir.

Q. By the way, did you, were you required to wear your uniform in the course of your duties as unit caretaker? A. No, sir.

Q. Did you from time to time as caretaker in the 770th receive written orders to go to Camp Murray and pick up equipment? A. No, sir.

Q. Do you know whether when you went to Camp Murray to pick up equipment you were proceeding under written orders?

A. I don't know, sir, no. [64]

Mr. Casey: May I have Plaintiffs' Exhibit 15, please?

Q. I will ask you whether you are familiar with Special Order No. 67 dated 8 March, 1953, from Headquarters Military Department, State of Washington, Office of the Adjutant General, paragraph 3, which states:

“Robert H. Madden. Co. Level NCO, Administrative Assistant, Headquarters and Headquarters Battery 770th Gun Battalion; James P. McBride, Eugene R. McDonald; Stanley N. DeArment and William L. Brown, Unit Materiel Caretakers, Headquarters and Headquarters Battery, Battery A, B and C of 770th Gun Battalion, respectively, Seattle, Washington, will proceed on or about 11 March, 1953, from Seattle to Camp Murray, on temporary duty for approximately one day for the purpose of transporting vehicles and supplies of the

(Testimony of Lawrence Brown.)

National Guard and upon compliance of temporary duty will return to their proper station.”

Are you familiar with that order?

A. Yes, sir. [65]

Q. Was it in accordance with that order that you went to Camp Murray on March 11th to pick up the equipment you were driving back at the time of this accident?

A. That order was not published for distribution until after the accident.

Q. But it was in accordance with that that you were proceeding?

A. Yes, sir.

Q. Well now——

Mr. Dovell: I am going to object to that. That is a conclusion because it is just so far as he has since learned. He didn't know it at the time he was acting.

The Court: Yes, in that sense.

Mr. Dovell: Conclusion now. [65-A]

The Court: It would seem to be this witness' conclusion about the matter. It doesn't add much to it anyway what the witness thinks about it one way or another as far as I can see. Go ahead.

Q. (Continuing): Well, now, I understand that you drove down to Camp Murray on the morning of March 11th with other unit caretakers of the 770th, is that correct?

A. Yes, sir.

Q. What equipment did you draw when you were there?

A. Mainly trucks and fire control equipment as I remember.

(Testimony of Lawrence Brown.)

Q. Well now, did you hook together the 2½-ton truck and trailer you brought back to Seattle with you?

A. I didn't hook them personally, no, sir.

Q. Did you know at that time the nature of the hook-up between the two vehicles?

A. Yes, sir.

Q. Did you know that there was no brake connection between the truck and the trailer?

A. Not until after it was hooked.

Q. But you did know it before you started from Camp Murray to return to Seattle?

A. Yes, I did.

Q. Now is it—I notice that the trailer—strike that. I notice that the trailer in this instance is a [66] four-wheel trailer?

A. That is correct, sir.

Q. Can that type and size of trailer be pulled by a jeep?

A. No, sir.

Q. Why is that?

A. I believe the trailer alone weighs more than the jeep, sir.

Q. What type of vehicle has to pull the type of four-wheel trailer that was involved in this case?

A. I believe the regulations say nothing less than a 2½-ton truck, sir.

Q. Had your unit—by your unit I mean the 770th—been on active duty shortly prior to this accident?

A. It had, sir.

Q. Had you been with it at that time?

A. No, sir.

(Testimony of Lawrence Brown.)

Q. When you joined the unit do you know whether it had any vehicles, any trucks?

A. I believe they had some, sir. I can't state for sure.

Q. Do you know whether there were electrical brake connections on the trailer and on the truck when you left Camp Murray?

A. I don't quite follow you, sir. [67]

Q. Well, you say that you learned about the absence of braking connection between the truck and trailer before you left Camp Murray but after the vehicles had been hooked together manually, is that right?

A. Yes.

Q. How did you learn about it; what did you do?

A. I asked if the brakes were hooked up.

Q. Who did you ask?

A. I believe it was Hart.

Q. And what did he say?

A. I was told that there was no brake connection that would work between that type of truck and that type of trailer.

Q. What did you do when you left Camp Murray and proceeded towards the point of the accident? Strike that.

As you proceeded toward Tacoma what was the condition of the weather?

A. Well, it had been raining. It was wet, cloudy out.

Q. Now, as you approached the scene of the ac-

(Testimony of Lawrence Brown.)

cident, say three, four hundred feet back from it, at about what speed were you traveling?

A. Somewhere between twenty and twenty-five.

Q. Do you know what the speed limit was at that time for the area immediately south of the Tacoma city limits? [68]

A. Thirty-five, I believe, sir.

Q. As you approached the scene of the accident in which lane of traffic were you driving?

A. The curb lane, sir.

Q. Well now, directing your attention to Plaintiffs' Exhibit 19, I wish you'd step over here for a moment if you will.

(Reporter's note. The exhibit just referred to, the map, is Exhibit 18.)

Q. Have you seen this map before?

A. No.

Q. To your right as you look at the map is north. A. (Nods head.)

The Court: Excuse me, Mr. Brown, your voice is a little soft anyway and when you turn and look at the map you see you are talking away from us. Talk real loud. That is why I don't ordinarily permit witnesses to leave the witness stand. Go ahead now, but talk real loud.

Q. To explain the map to you briefly, to your right is north. The area to which I am pointing now represents the curb lines. This is the curb line that was on your right or east side of US 99. This is the curb line that was on your left or the west side

(Testimony of Lawrence Brown.)

of 99 as you were proceeding north on US 99. This vertical line across the street at this point is the city limits. What has been [69] marked over here in these rectangles as Star Trailer Court was the court on the west side of the street at about where the accident took place. And on the east side of the street at approximately that same point is marked "service station."

Now you will notice according to the map that before you entered the city limits of Tacoma according to the markings that are on the pavement, that there is an interrupted horizontal line on the map apparently representing the dividing line between two northbound lanes and then just above that is a completely filled in line which represents a marker between two lanes.

Now with that background will you state what lane of traffic you were driving in as you approached the Tacoma city limits?

A. I believe it was the curb lane, sir.

Q. That is the lane closest to the curb assuming it to be a curb lane, a lane next to that and then a lane next to the center, is that correct?

A. I believe so, yes, sir.

Q. All right, you may——

The Court: Mr. Brown, sometimes that lane right next to the curb is called a parking lane where cars are parked, you have probably heard it being referred to as that? [70]

The Witness: Yes, sir.

(Testimony of Lawrence Brown.)

(Whereupon, the witness resumed the stand.)

The Court: You mean you were in that lane at that point, that you were right over next to the curb in the lane that would be a parking lane if parking were permitted, is that what you mean?

The Witness: I don't remember any parked cars there, your Honor. I am confused about the road now. I don't remember it being a three-lane road.

The Court: Go ahead.

Q. Did you, as you approached the city limits of Tacoma, notice any signs, flags or trucks parked in the northbound portion of the highway?

A. Well, I did, sir, but I don't know how close I was to the city limits.

Q. How close were you to the warning sign nearest you when you first noticed it?

The Court: What was the first thing you noticed of that character, let's get at it that way.

A. It was the sign itself, sir.

The Court: What sign was that?

The Witness: "Men Working" sign.

The Court: Where was that located?

The Witness: Placed in the curb line.

The Court: Out in the street? [71]

The Witness: Yes, sir.

The Court: All right now, answer Mr. Casey's question.

(Testimony of Lawrence Brown.)

Q. Where were you when you first saw that sign?

A. Oh, maybe sixty feet. I am not sure about the distance, sir.

Q. Well, would it be approximately sixty feet?

A. Something like that. I might be able to refresh my memory from the deposition.

The Court: You ought to be able to remember that now just as well as when the deposition was taken.

Q. At about what speed were you going when you first noticed that warning sign?

A. I was still approximately somewhere between twenty and twenty-five, sir.

Q. What was the condition at that moment of other traffic proceeding north on US 99? Were there any cars ahead of you, to the side of you?

A. Oh, yes, there were a lot of cars.

Q. Now, at the moment that you first saw this warning sign was there a vehicle ahead of you in the same lane of traffic that you were driving?

A. There had been, yes, sir.

Q. Was there at the moment you saw the sign?

A. No, sir. [72]

Q. When you say there had been, explain what you mean.

A. Well, the car in front of me had changed lanes and pulled into the center lane and it was then that I saw the sign.

Q. Now, if you were about sixty feet back from the warning sign when you first saw it, about how

(Testimony of Lawrence Brown.)

far back from the warning sign were you when the car immediately ahead of you changed lanes?

A. Golly, I don't know, sir.

Q. Well, approximately, Mr. Brown. Well, strike that and let me ask you this. As you were driving down there approaching the south city limits were you keeping a lookout ahead?

A. Yes, sir.

Q. State whether you saw the warning sign as soon as the car ahead of you changed lanes?

Q. At the time you saw the warning sign what

A. I believe I did, yes.

was the condition of traffic in the other northbound lanes? A. There was a car alongside of me.

Q. Now, at the time you saw the warning sign where would you say the front of this car alongside of you was with reference to the front of your truck?

A. Oh, I think the front of his car was about, near [73] the rear of the truck itself.

Q. And by truck you mean the back of the 21½-ton? A. Yes.

Q. Not the back of the trailer?

A. That is correct.

Q. Was that car next to you going slower or faster than you were?

A. He was going faster than I was.

Q. What did you do when you saw the warning sign? A. I immediately applied the brakes.

Q. Did you apply them hard or soft?

A. Soft, sir.

(Testimony of Lawrence Brown.)

Q. Tap it? A. Yes, sir.

Q. What happened then?

A. I started to slow down. I was waiting for the car alongside of me to pass me so I could change lanes.

Q. Then what happened?

A. Well, I had to apply the brakes again and it was then that the trailer whipped.

Q. Now explain just what happened when you applied the brakes the second time?

A. When I put on the brakes the second time the slack was taken up in the trailer connection and the trailer hit the back end of the truck and whipped it around [74] towards the curb.

Q. Towards the east curb? A. Yes.

Q. The right-hand curb? A. Yes, sir.

Q. That whipped the rear end of the truck towards the right-hand curb? A. Yes, sir.

Q. What did that do to the front of the truck?

A. Shoved the front of the truck to the left-hand side over across the center line.

Q. Did this all happen rather instantaneously?

A. Yes, sir.

Q. In what direction was the truck going as it was swung to the left across the center line as you say?

A. For awhile it was almost dead west, headed dead west.

Q. In other words, the truck swung sharply, it was going north and all of a sudden it was going west? A. Yes.

(Testimony of Lawrence Brown.)

Q. Were you trying to get it under control?

A. Well, we were all given driving tests.

Q. Were you trained to get it under control at the time?

A. I was trying to get it under control. [75]

Q. Was it out of control at the time?

A. Yes, sir.

Q. And did the truck cross the center line of US 99? A. It did.

Q. Do you know in what lane the front bumper of the truck was at the time of the impact with the Nash automobile?

A. I am not sure of it, sir.

Q. Could it have been the lane closest to the west curb of US 99?

A. It could have been although I didn't think it was that far, sir.

Q. At about what speed do you believe the truck was traveling at time of impact?

A. It is pretty hard to say, sir, but I think it was under twenty.

Q. Did you feel much of a concussion when the impact occurred?

A. Well, it jolted me out of the seat, yes, sir.

Q. Did you bring the truck to a stop as soon as you could? A. Yes, sir.

Q. When you brought the truck to a stop where was the front bumper of the truck with reference to the west curb line of US 99? [76]

A. You mean where was the truck located, sir?

Q. Yes.

(Testimony of Lawrence Brown.)

A. It was located in the driveway of the Motor Court.

Q. And where it stopped then was the earliest time that you could stop the truck, is that right?

A. Yes, sir.

Q. Well, was all of the truck and trailer to the west of the west curb line by that time?

A. I believe it was, sir, yes.

Q. Well, was there any space between the west curb line and the rear end of the trailer when you first brought it to a stop?

A. I believe there was, yes, sir.

Q. About how much space do you think?

A. I wouldn't know, sir.

Q. Could it have been as much as twenty feet?

A. I wouldn't think that far, sir.

The Court: Do you mean now that the whole of the truck and trailer were completely out of the paved portion of 99, is that what you mean?

The Witness: Completely off the street, yes, sir.

The Court: Completely out of the paved portion of the highway beyond the west curb line? [77]

The Witness: Yes, sir.

Q. Handing you what has been marked Plaintiffs' Exhibit Number 1, I will ask you if that is the position that the truck and trailer first came to rest after the accident?

A. It appears to be; yes, sir.

The Court: That would be west of the sidewalk on the west sidewalk of South Tacoma Way, is that right?

(Testimony of Lawrence Brown.)

The Witness: Yes, sir.

Q. Where was the Nash automobile when you got out of the truck?

A. The Nash was sitting across the sidewalk south of the truck heading back north.

Q. Well, about how far was the Nash automobile south of the truck, how much distance would you say there was between them?

A. Oh, I suppose maybe fifty, sixty feet, sir, I don't know.

Q. You say the Nash automobile was on the sidewalk?

A. I believe it was across the sidewalk, sir, it was clear.

Q. To the west of the sidewalk?

A. Yes, west of the sidewalk.

Q. About as far west of the sidewalk as your truck was? [78]

A. Possibly.

Q. What did you do when you got out of the truck?

A. I immediately ran up to the Nash.

Q. State what you saw and did then?

A. By the time I got there there was a patrol wagon there, Tacoma Police, and also a State Patrolman, and they got the door open. I couldn't get the door on the driver's side open. They got the door on the passenger side, the front door, open.

Q. Did you try to get the driver's door open?

A. Yes, sir.

Q. Could you see somebody in there?

A. Yes, sir.

Q. Mrs. Wendt?

A. Yes.

(Testimony of Lawrence Brown.)

Q. Where was she in the car?

A. She was laying across the front seat, sir.

Q. You say the State Patrol and others got the other door open?

A. Yes, sir, the Tacoma Police did, sir.

Q. What was her condition as far as you could observe?

A. It was hard to tell, sir. She was unconscious.

Q. What did you see done with her?

A. She was placed on a stretcher and taken immediately [79] to the hospital.

Q. Mr. Brown, as you perform your duties of caretaker in Battery C are there any United States Army personnel on duty at the National Guard who supervise your activities?

A. There are United States Army personnel on duty in the armory but as far as supervising I wouldn't say they did that, sir.

Q. Well, are they advisory personnel to the National Guard units?

A. They are, sir.

Q. They are not National Guard officers, are they?

A. No, sir.

Q. Do you have occasion during the course of your duties to come in contact with them?

A. Yes, sir.

Q. Quite often?

A. At that time almost every day.

Q. In March of 1953?

A. Yes, sir.

Q. Were they familiar with what you were doing with your time?

A. Yes, sir.

Q. Do you know of your own knowledge that

(Testimony of Lawrence Brown.)

they knew that you went down to Camp Murray to pick up equipment for the unit? [80]

A. They knew it, yes, sir.

Q. Did they ever object to you, to the fact that you went down to Camp Murray to pick up the equipment?

A. No, sir.

Q. To your knowledge did they ever object to anybody?

A. No, sir, not to my knowledge.

Q. The day that you picked up the truck, this equipment you were taking back to Seattle, did you see Col. Hagen?

A. No, sir.

Q. Did you see any other regular army military personnel there at Camp Murray?

A. Not to my recollection, no, sir.

Q. Mr. Brown, prior to January of 1953, were your duties in Battery C any different from what they were after January of 1953?

A. My particular duties were not, sir.

Q. Were you the only civilian employee in Battery C?

A. I was, sir.

Q. Were there other civilian personnel employed similar to you in batteries—what do you have, headquarters and headquarter battery and then A, B and D?

A. There are four firing batteries A, B, C and D, sir.

Q. Did each of those firing batteries have a unit [81] materiel caretaker?

A. They did, sir.

Q. Did you receive any change in pay after January of 1953 by virtue of your title being

(Testimony of Lawrence Brown.)

changed from unit materiel caretaker to administrative, supply and maintenance technician?

A. I did, sir.

Q. What was that increase, if you know?

A. I think around \$300 a year, sir.

Q. That you were increased? A. Yes, sir.

Q. Was that because of your change in duties?

A. Yes, sir.

Q. And did you still continue to be paid on a monthly basis for your duties as administrative, supply and maintenance technician?

A. Yes, sir.

Q. The check came from the same place?

A. Yes, sir.

Q. And the increase was all reflected in the same monthly check that you got? A. Yes.

Q. Did you know the reason for the increase?

A. Well, I had put in my year in the particular step, grade, that I was in and that was part of the raise. [82] What it was for the other part I don't know, sir.

Q. Were you at, about the spring of 1953, were you getting rid of the old 2½-ton trucks in the National Guard?

A. I believe it was around that time we were, yes, sir.

Q. You have driven 2½-ton trucks before in the National Guard, haven't you? A. Yes, sir.

Q. You had driven them with trailers, hadn't you? A. Yes.

(Testimony of Lawrence Brown.)

Q. Had you driven the new 2½-ton trucks before? A. Yes, sir.

Q. When you were driving the old 2½-ton trucks with trailers did you hook together the brake connections? A. We did, sir.

Q. How did you do it?

A. By means of an electrical cable.

Q. Just manually? Since I have never seen one, tell me what you did and how you fastened it and so forth.

A. There is a receptacle on the back of the truck and front of the trailer, sir, with a rubber sheet cable that ran from the truck to the cable, plug it in both ends.

Q. And the one had holes in it and the other like a regular electrical connection, you put the prongs into [83] the holes?

A. They weren't exactly on the same order but accomplished the same purpose.

Q. And then you'd clamp it together?

A. No, sir, they weren't clamped.

Q. Well, did the trailer on the date of this accident that you were hauling have such a receptacle?

A. It did, sir.

Q. Did the truck have such a receptacle?

A. It had a receptacle, yes, sir.

Q. But they wouldn't fit together?

A. Right, sir.

Q. Well, in driving—I don't know whether I asked you this or not. Had you driven one of the new 2½-tons with the trailer before?

A. No, sir.

(Testimony of Lawrence Brown.)

Q. Was it your practice in driving the old 2½-ton with the trailer to always hook the electrical brake receptacles together? A. It was, sir.

Q. Were those your orders? A. Yes, sir.

Q. Was it safe to drive them if they weren't hooked together? A. Hard to say, sir. [84]

Q. It wasn't safe in this accident, was it?

A. No, sir.

Q. That is what caused the accident, wasn't it?

A. Yes, sir.

Q. What was your answer? A. Yes, sir.

The Court: Did you know that when you left Camp Murray or did you find that out in the accident, Mr. Brown?

The Witness: Sir?

The Court: Did you know that last thing that you said when you left Camp Murray that day, or did you find it out as a result of this accident?

The Witness: I was afraid of it when I left, sir.

Q. Are you familiar with what is known as a conversion unit for brakes? A. Yes, sir.

Q. What is it?

A. Well, it is a unit that can be adapted to the new truck so you can use the old trailers with the brakes. It consist of a lever in the cab of the truck which can be pulled and set the brakes on the trailer, sir.

Q. Was this new truck equipped with such a conversion unit? [85] A. No, sir.

Q. Does your unit have any conversion units, did your unit of the National Guard have any conver-

(Testimony of Lawrence Brown.)

sion units to permit the connecting of old trailers and new trucks?

A. I don't believe so, sir.

Q. Did the National Guard at Camp Murray to your knowledge have any such conversion units?

A. I wouldn't know, sir.

Q. Were you a caretaker in any National Guard unit in the, during the spring, summer and fall of 1952?

A. Yes, sir.

Q. At that time do you recall seeing or receiving orders to turn in old 2½-ton trucks?

A. I don't recall right now, sir.

Q. Do you recall receiving an order to turn in the conversion units?

A. No, sir.

Q. Do you know whether there was such an order?

A. No, sir.

Q. Well, when you first saw the Telephone Company warning flag do you believe you could have brought your truck to a stop without changing lanes?

A. I don't think so, sir.

Q. By the way, as you whipped across that highway, part of your truck hit the warning sign, didn't it? [86]

A. I believe the trailer did, sir.

Q. When you first saw the warning sign could you see all of it?

A. Yes, sir.

The Court: Where was that warning sign sitting? I don't think you have ever told us where it was in relation to anything you know. For example, can you tell us where it was with relation to the

(Testimony of Lawrence Brown.)

city limits' line; is there any physical marker of the city limits there?

The Witness: The only thing I can remember, sir, is the fire hydrant.

The Court: Where was it with relation to the fire hydrant?

The Witness: I believe it was north of the fire hydrant, sir.

The Court: North of the fire hydrant?

The Witness: Yes.

The Court: And in the street?

The Witness: Yes.

The Court: All right.

Q. I believe you testified in the same line of travel that you were proceeding?

A. Yes, sir.

Q. Was the warning sign over the crest of the hill [87] the other side of the crest?

Mr. Rupp: I will object to that on the ground it is leading, if your Honor please.

Q. (Continuing): Where was the warning sign with reference to the crest of the hill?

A. I believe it was over the crest of the hill, sir.

Q. By that, do you mean on the far side from you? A. Yes, sir.

The Court: North?

The Witness: Yes.

Q. North.

Mr. Casey: I have no other questions.

The Court: Mr. Dovell?

(Testimony of Lawrence Brown.)

Cross-Examination

By Mr. Dovell:

Q. What signs did you see, Mr. Brown?

A. The usual yellow metal "Men Working" sign.

Q. Did you see any other?

A. I believe there was another one ahead, north of that sign. I am not positive about that.

Q. In your capacity as a caretaker do you act on your own initiative or by what reason do you act?

A. I'd say a little on your own initiative and on [88] orders.

Q. Well, when you transport vehicles, trucks and trailers, do you go after those on your own initiative?

A. Well, we are told to go get them, sir.

Q. Who tells you?

A. Well, as a rule the orders would come out in the form of an issue slip or an order stating that, letter stating that your vehicles were ready for pick up from Camp Murray, sir.

Q. Are you required to obey those orders?

A. I would say yes, sir.

Q. And have you any room to exercise your own discretion in those orders? A. No, sir.

Q. You have to obey those orders?

A. I would say yes, sir.

Q. Is that the reason why you proceeded with

(Testimony of Lawrence Brown.)

the truck and trailer? A. Yes, sir.

Q. Without proper coupling?

A. Yes, sir.

Mr. Dovell: I think that is all.

The Court: Did you get any oral directions on this particular day of March 11th or the day before about going for this truck and trailer? [89]

The Witness: I think we knew probably three or four days before, sir, that we were going that day to pick up vehicles and equipment.

The Court: Who told you about that?

The Witness: Well, it would have been the Battalion Administrative Officer, sir.

The Court: That is of the National Guard Battalion?

The Witness: Of the 770th, Gun Battalion, yes, sir.

The Court: Who was that at that time?

The Witness: Capt. Nelson.

The Court: You got your instructions in the first instance orally from Capt. Nelson, is that right?

The Witness: Yes.

The Court: About three or four days in advance?

The Witness: Yes, sir.

The Court: That is all you knew about it then until after the accident happened, as far as orders were concerned, is that right?

The Witness: Yes, sir.

The Court: At some later time your attention

(Testimony of Lawrence Brown.)

has been called to the fact that apparently some order was cut at some time or other about it but you didn't know that on the day you went to get the truck or trailer?

The Witness: No, sir. [90]

The Court: This sign that was in the street was a standard, on a metal standard, the "Men Working" sign that we commonly see?

The Witness: Yes, sir; yes, sir, it is a standard thing.

The Court: It is on a steel or metal standard and it stands upright vertically and has this sign?

The Witness: Yes, sir.

The Court: You say you saw some other sign further north ahead of that?

The Witness: I believe I did, yes.

The Court: But what that said or what was on it, wording, you don't know?

The Witness: Well, I believe it was another "Men Working" sign.

The Court: Another one of these "Men Working"? Now at the same time did you see the vehicles of the Telephone Company?

The Witness: Yes, sir.

The Court: Still saw them further north?

The Witness: Yes, sir.

The Court: From where the signs were?

The Witness: Yes, sir.

The Court: No obstruction to visibility there at that time? [91]

The Witness: No, sir.

(Testimony of Lawrence Brown.)

The Court: No fog or smoke or obstructions or anything like that in the street to prevent your seeing them?

The Witness: No, sir.

The Court: The only thing that restricted you in seeing this one sign was the vehicle that was in the lane ahead of you?

The Witness: Yes, sir.

The Court: When it turned to the left you immediately saw these signs and the Telephone Company trucks on beyond that, is that right?

The Witness: Yes, sir.

The Court: Do you have something further?

Mr. Rupp: Along that same line, if your Honor please.

Cross-Examination

By Mr. Rupp:

Q. You didn't—how soon, Mr. Brown, did you see the Telephone Company truck, if you know, laying that matter of signs aside for the moment?

A. Well, I don't know. I think I saw it probably almost immediately when I saw the sign.

Q. But you didn't see it before, is that [92] right? A. No, sir.

Q. You were looking down the highway, were you not, when you were driving? A. Yes, sir.

Q. You didn't see it? A. No, sir.

Q. How big a truck was it, do you remember?

A. The Telephone Company truck?

Q. Yes. A. I don't recall, sir.

(Testimony of Lawrence Brown.)

Q. Which way was it facing, do you remember that? A. I believe it was facing north.

Q. It is your recollection it was facing north?

A. Yes, sir, I believe it was backed up.

Mr. Casey: I will object to the form of the question, your Honor, until it is indicated whether his recollection is based on what he saw as he approached the scene of the accident or what he noticed after the accident was all over.

The Court: It wouldn't make any difference what his recollection was, and that is cross-examination of this witness of course, so I have got to allow some latitude in any case. Overruled, go ahead.

Q. How high are you sitting from the pavement, if you know, when you are driving this army 21½ ton truck? [93] I am using the present tense. You used the past tense. How high were you sitting from the pavement?

A. I don't know the exact height, sir.

Q. I take it it is a fair statement, isn't it, that you are not a very good judge of distances expressed in terms of feet?

A. That is right, sir.

Q. But when you approach that truck to get into the cab you must have some idea, Mr. Brown, or must have some recollection at this time as to about how high the seat of the cab is with relation to your own height at any rate, haven't you?

A. Oh I think probably about shoulder high maybe.

(Testimony of Lawrence Brown.)

Q. How tall are you if you know?

A. About five ten, or eleven. I am not sure.

Q. And you are of normal construction I think so that, that is, you are not excessively longwaisted or shortwaisted, is that right? A. No.

Q. That would put your eye level then about eight feet above the pavement, doesn't it, by process of arithmetic? A. I imagine.

Q. Roughly that? I am not trying to pin you down to accurate statement but that is approximately what it would be? [94] At any rate you are considerably higher off the pavement, are you not, than anyone driving an ordinary passenger car coming down the road? A. Yes, sir.

Q. And consequently have better visibility ahead of you, haven't you? Can you see over the heads of most automobiles, over the tops of most cars that are ahead of you?

Mr. Dovell: I object to that form of question. That would depend upon how close you were to the vehicle in front of you.

The Court: I am aware of all of those things but the objection is overruled. Keep in mind this is cross-examination. Go ahead.

A. Well, as he stated, it would depend on how close I was following the cars.

Q. Well, sure, if there is a car right smack ahead of you you can't very well see pavement in front of him. Now there was, I think you testified there was a car ahead of you and that that car changed lanes. Do you have any recollection of the

(Testimony of Lawrence Brown.)

manner in which he changed lanes? Perhaps I ought to be more specific. Did he suddenly swerve or was it a gradual swing out or what, was it a normal driving process or did it look like an emergency matter? [95]

A. Well, it didn't look like he changed too sharply.

Q. I think in your deposition your language was it was not like a last minute sort of thing. Is that still an accurate characterization of it?

A. Yes, sir.

Q. Now you applied your brakes?

The Court: Are you expecting to have this gentleman back after lunch in any case, in any event? I mean, is he going to be back here in any event? If he is I am going to suspend now. If it would convenience him and you think you could conclude in a few moments——

Mr. Rupp: I can finish inside, I should say, of fifteen or ten minutes.

The Court: Is he going to be back anyway, that is what I want to know? If he is going to be back anyway, I will suspend anyhow.

Mr. Casey: I would feel that I would want him back in any event.

The Court: I suspected that, so there is no point in going beyond this period. All right, you will have to return, Mr. Brown, I guess in any case. You may stand down, sir.

We will recess now, gentlemen, until approxi-

(Testimony of Lawrence Brown.)

mately two-thirty, maybe two-forty-five, somewhere. I'd like to be able to go forward at two-thirty. We have quite a large [96] group of petitioners for naturalization here and a little ceremony in connection with it, but you will be free until two-thirty. But I would appreciate if you would be able and ready to go forward at that time.

Mr. Casey: May I ask your Honor approximately to what hour you will continue then?

The Court: Approximately four-thirty.

Mr. Casey: Thank you, your Honor.

The Court: Very well, we will recess this case until two-thirty and Court will reconvene subject to call after the lunch period.

(Whereupon at twelve o'clock noon a recess was had until two o'clock p.m. at which time other matters were considered and following which, at 2:35 o'clock p.m., respective counsel heretofore noted being present, the instant case was resumed and the following proceedings were had, to wit:)

The Court: Ready to proceed?

Mr. Casey: Ready to proceed, your Honor.

The Court: Call the witness back. Mr. Brown, I think there was some additional examination.

Mr. Casey: Your Honor, I wonder if I might address a question to the Court before commencement of the afternoon session? [97]

The Court: Yes, of course.

Mr. Casey: Your Honor made the statement sev-

(Testimony of Lawrence Brown.)

eral days ago at the time of the signing of the pre-trial order that your Honor wanted to get all the testimony regarding liability in first and it occurred to me afterwards that you might have had in mind witnesses on both sides on liability.

The Court: Yes, that is what I did have in mind, was to suggest the possibility that we hear all the testimony about liability and conclude that phase of the case and determine if there be liability and if so as to whom and go forward then with the proof of damages of it. However, I am not, I leave it up to you gentlemen to consider that possibility. I thought it might save someone some time somewhere along the line, but——

Mr. Casey: It might very well, and if that were to be the order why I had already advised defense counsel that we would take approximately two days and a half in presentation of the plaintiffs' case, but of that two days and a half there would be in excess of half a day on medical testimony.

The Court: Well, you think about it in that light. If you want to separate, in other words, if we separate the issues we will try out the liability issues fully and conclude them and go forward with the evidence [98] and determination of damages following that, or if you prefer, we can go right ahead and try the whole thing. It is no matter to me. I just suggested it as a possibility of saving some time for someone.

Mr. Casey: Thank you.

The Court: Very well. I think you were examining?

(Testimony of Lawrence Brown.)

Mr. Rupp: I was, if your Honor please.

(Whereupon, the witness Mr. Brown resumed the witness stand for continued cross-examination by Mr. Rupp.)

Q. Mr. Brown, had you ever before driven a 2½ ton truck together with a trailer that weighed 8100 pounds that didn't have any brakes on it?

A. No, sir.

Q. This was your first happy experience with that sort of thing, is that right? A. Yes, sir.

Q. Now I think you said at some point, perhaps it was in your deposition, something about having slowed down some distance south of Mr. Casey's point when you first, when Mr. Casey first placed you on the highway, you recall? I think there was some testimony along the line somewhere about your having slowed down because of a traffic light. Was there a traffic light on this highway at any point? [99]

A. Yes, sir, south of the city limits there is a traffic light.

Q. About how far south, do you know?

A. Two blocks I believe.

Q. I see. And was that light red?

A. No, it was green.

Q. You came from the south and the light was green and the light remained green as you went through, is that correct? A. Yes.

Q. Did you reduce your speed at all?

A. Yes, I did.

(Testimony of Lawrence Brown.)

Q. And why did you do that?

A. Well, because mainly the light was green quite a while before I got to the light and I knew I couldn't stop in a hurry with it and I slowed down so that if it did turn red I could make the stop.

Q. And about how fast were you going at the point of the light, do you remember?

A. I believe it was less than twenty miles an hour.

Q. Now this truck that you were driving has a hydramatic transmission in it, does it not?

A. Yes, it does.

Q. And that, of course, is an automatic transmission and as I recall it has four speeds forward, is that correct? [100]

A. Well, in high range it has four forward, yes.

Q. Yes. And were you in high range?

A. I was.

Q. Do you have any recollection of what gear you were in at this point which Mr. Casey characterized as being three hundred, four hundred feet south of the scene of the accident?

A. I have no recollection, now, sir, but it must have been around second gear.

Q. You were not in top gear? A. No, sir.

Q. And also you were not in the first or very low gear? A. No.

Q. Now I want to clear up this matter of the curb lane because I think that you and I probably see eye to eye on it and probably all do, but I want to get the record straight. In your thinking how

(Testimony of Lawrence Brown.)

many lanes of traffic does South Tacoma Way have at this point that we are talking about?

The Court: Northbound lane?

Q. (Continuing): The whole South Tacoma Way, both north and south?

A. Four lanes sir.

Q. You regard it as a four-lane highway?

A. Yes, sir. [101]

Q. Just as I do. And right along the curb cars park, is that right?

A. I believe they do, yes, sir.

Q. And we could refer to that as the parking lane, could we? A. Yes, sir.

Q. Now, when you refer to being in the outside northbound lane you mean then the lane which is just west of this parking lane? A. Yes, sir.

Q. That is what I thought, where I thought you were, but I think the record was a little bit confused on it and I wanted to be sure. Now as I understand you, when you first saw this sign you looked to the left, did you? What did you do right after you saw the sign?

A. I immediately applied my brakes.

Q. And I think your verb was that you "tapped" your brakes? A. Yes, sir.

Q. And a short time later you applied the brakes again, is that right? A. Yes, sir.

Q. Do you know how much time elapsed between your first application and your second?

A. No, sir. [102]

(Testimony of Lawrence Brown.)

Q. I appreciate it is very difficult to measure. Your second brake application was a little bit harder than your first, is that right?

A. Yes, sir.

Q. Did you at any time slam on your brakes?

A. No, sir.

Q. In terms of the passage of the brake pedal do you know from its neutral position as it were, to the floor, have you any idea how far the pedal traveled on the first application or your second?

A. No, sir, I haven't.

Q. Well, this car, truck had only forty-two miles on it and presumably the brakes were in good shape, is that right?

A. They are in good shape on all of them.

Q. On the truck? A. Yes, sir.

Q. Now while you were driving north on US 99 on the morning of March 11th, will you tell us anything about your physical condition, were you sound of wind and limb? A. Yes, sir.

Q. It sticks in my mind you had an appointment with a physician, is that right?

A. Yes, sir. [103]

Q. In Seattle? A. Yes, sir.

Q. And I don't want to be impertinent, but why was that? Did it have anything to do with your physical condition?

A. I had had a cold and a headache.

Q. I sympathize with you. Did you have a headache at the time?

A. I guess I did, yes, sir.

(Testimony of Lawrence Brown.)

Q. Well, is there anything in your physical condition that would impair your driving?

A. No, sir.

Q. Eyesight was good and all that sort of thing?

A. Yes, sir.

Q. Do you remember whether or not the car that was alongside you when you tapped your brakes cleared your truck, that is, did it go by? It was overtaking you, I take it?

A. Yes, sir, it had gone by.

Q. It did go by? A. Yes, sir.

Q. Have you any idea when that was or where on the highway?

A. It was just about the time that I approached the sign. It was about the time that I hit the brakes the [104] second time.

Q. I see. But as I recall your testimony is, that the truck did not strike this first sign?

A. I don't believe it did, no sir.

Q. You think the trailer did though?

A. Yes, sir.

Q. At any rate something struck it and knocked it flying, is that right? A. Yes, sir.

Mr. Rupp: I think that is all I have of Mr. Brown.

The Court: Anything further from this witness?

Mr. Casey: Yes, your Honor.

(Testimony of Lawrence Brown.)

Redirect Examination

By Mr. Casey:

Q. Mr. Brown, on the day of the accident and thinking of your duties as one phase, as generally your duties being one phase as caretaker and one phase being a National Guardsman, on the day of the accident did you perform any duties other than those of a unit caretaker? A. No, sir.

Q. Now, with reference to orders under which you were proceeding on March 11th, if you recall I read Special Order No. 67. Was—what is the practice regarding [105] your actual receipt of written orders to go to Camp Murray?

A. Verbal, sir. I receive verbal orders.

Q. What is known as VOCO?

A. Yes, sir.

Q. Verbal Orders Commanding Officer?

A. Yes, sir.

Q. So as a matter of fact you don't too often see the orders written directed to you but are given to you by the commanding officer, is that correct?

A. Yes.

Q. Or somebody acting at the unit. Now on this particular day were you proceeding to Camp Murray to draw equipment in accordance with any regularly scheduled equipment draws? You have monthly draw dates, do you not?

A. Yes, sir; yes, sir, but I think this was a special draw date for the vehicles.

(Testimony of Lawrence Brown.)

Q. Now have you ever been injured while you were in the course of your duties as a caretaker?

A. Yes, sir.

Q. Where did you go for treatment of the injuries?

A. United States Public Health Hospital, Seattle.

Q. Why did you go there?

A. Well, we are covered by United States [106] Public Health Service for injuries received on the job.

Q. If you were injured in the course of your duties as a National Guardsman during the two nights or two hours a week, where would you have received your medical treatment?

A. If I was in Seattle it would be at Fort Lawton, sir.

Q. How close was your truck to the west curb of US 99 as you approached the scene of the accident? Do you understand my question?

A. Yes, sir, I am trying to think.

Q. In other words, with reference to the right-hand side of your truck about how close was that to that curb line?

Mr. Rupp: East curb line.

Mr. Casey: Strike the question. I mean the east curb line.

Q. As you approached the scene of the accident how close was the right side of your truck to the east or right-hand curb line?

A. Oh, I would say three feet, sir.

(Testimony of Lawrence Brown.)

Q. As you approached the scene of the accident did you at any time see any flashing red light on any of the Telephone Company equipment?

A. I don't recall. [107]

Q. As you approached the scene of the accident did you at any time see a red flag or flags on your side of the Telephone Company trucks?

A. I don't recall any, sir.

Q. When you first saw the warning sign to which you have testified did you see the entire sign and its legs at first?

A. No, sir, as I recall I saw just the yellow part of the sign.

Q. The top part of it? A. Yes, sir.

Q. And if this object that I am placing in front of you which is an iron rectangular framework with legs that appear to be about a foot high and with a yellow sign hanging in the middle of it saying "Men Working" had been the sign you saw as you, when you first saw the warning sign, would you have seen the portion below the yellow sign, from that down to the ground?

Mr. Rupp: If you know.

Q. (Continuing): If you know?

A. I don't recall seeing it, sir.

Q. It is your testimony that you saw the top and not the bottom, isn't that right?

A. Yes, sir.

Q. Did you see the top of the trucks as well when [108] you first saw the top of the sign?

A. Yes, sir, I know I saw the top of the truck.

(Testimony of Lawrence Brown.)

Q. You have towed a truck with a trailer without connecting brakes around military reservations before March 11th, hadn't you?

A. Jeep, sir.

The Court: You mean a trailer on a jeep?

The Witness: Yes, sir.

Q. As you approach the scene of the accident—by that I mean at the time you first saw this warning sign—in what gear were you driving?

A. I don't believe I know, sir.

Q. Now you testified in answer to Mr. Rupp's question that when you were three to four hundred feet back you were not in top gear but you were in high range, is that right? A. Yes, sir.

Q. Well, did you change gears between that time and the time you get up to the point of seeing the sign?

A. I believe I changed forward and back again, sir.

Q. Well now, I don't understand what that means. Can you explain to me?

A. Well, the truck gearshift is connected with the throttle on each and it shifts automatically according to pressure put on the throttle. In other words, if I [109] stepped on the gas it would—and gained speed—it would shift into a higher gear.

Q. Well, at the time you saw the sign were you in the highest gear you drive in? A. No.

Q. There are four of those gears, right?

A. Yes.

(Testimony of Lawrence Brown.)

Q. Well, was the highest one called first, first, second, third, fourth?

A. They are numbered from—first is low gear I believe, sir.

Q. First is the lowest of the high range, right?

A. Yes, sir.

Q. All right. Do you know then at the time you first saw the warning sign whether you were in first, second, third, or fourth of the high range gear?

A. I think I was in either second or third, sir.

Mr. Casey: That is all.

The Court: Anything further?

Recross-Examination

By Mr. Dovell:

Q. Mr. Brown, this morning you spoke of contact with army officers. Would you explain what you meant by that word "contact"? [110]

A. You are referring to the army advisors?

Q. Yes.

A. Well, when we were stationed in the armory we, they were stationed right there in the armory with us.

Q. In the armory? A. Yes, sir.

Q. At Seattle?

A. Yes, sir. We had contact with them in different ways every day.

Q. What nature of contact?

A. Asking for advice, even going to lunch with them as far as that is concerned.

(Testimony of Lawrence Brown.)

Q. Did any of them give you any orders?

A. No, sir.

Q. Just advice? A. Yes, sir.

Q. Was that instructive advice?

A. Yes, sir.

Q. I notice you say that you recognized the trucks at the time of seeing this sign "Men Working." Did you know what trucks they were?

A. Not immediately, no, sir.

Q. Did you know at that time when you saw the trucks, did you know whose trucks they were?

A. No, sir. [111]

Q. Did you know what they were there for at that time? A. No, sir.

Q. Was there anything on them that you could identify as to whose they were?

A. Not until after the accident, no, sir.

Mr. Dovell: That is all.

The Court: All finished with this gentleman?

Mr. Casey: I am, your Honor.

The Court: Very well, Mr. Brown, you are excused. You may leave at your pleasure.

(Witness excused.) [112]

CAPT. MARVIN GLEN WUBBENS

being first duly sworn on oath, was called as a witness on behalf of the Plaintiffs and testified as follows:

Direct Examination

By Mr. Casey:

The Clerk: State your full name and spell your last name.

The Witness: Marvin Glen Wubbens, W-u-b-b-e-n-s.

Q. You are not under army regulations, are you Captain? A. No, sir.

Q. What is your address, sir?

A. 821 - 83rd Avenue, Seattle, Washington,

Q. What is your military status now?

A. Now I am a National Guard officer, the S2 Officer of the 770th National Guard.

Q. S2 of what?

A. S2 Officer, 770th AAA Gun Battalion National Guard.

Q. What other military status do you hold? Well, you say you are a Captain.

The Court: You mean now?

Q. (Continuing): Now.

The Court: All right, go ahead.

A. Well, I hold the, a commission in the [170] Washington National Guard and also a commission of the Army Reserve Commission of the Army.

Q. That is what I had reference to. What is your serial number, Captain? A. O984607.

Q. What were your commissions on March 11,

(Testimony of Captain M. G. Wubbens.)

1953, the date of the accident between the army truck and the private car?

A. I was a battery commander of C Battery of the 770th Triple A Gun Battalion.

Q. When had you become Commanding Officer of Battery C?

A. Well, the 770th was on active duty approximately July of 1951.

Q. This was 1953. I don't think I quite follow you.

A. You asked me——

Q. When did you become——

A. The battery commander?

Q. Yes.

A. July, 1951, while we were on active federal service.

Q. Oh, I see. When you say on active service you mean in active federal military service?

A. This particular unit was called into service, mobilized. We were mobilized at the start of the Korean situation and we were on active federal service for a period [171] of two years.

Q. Well now, when did your unit—by “your unit” I mean Battery C of the 770th AAA Battalion—when did your unit obtain its release from federal service and revert to National Guard status?

A. That was July 14, 1952.

Q. Now as of July 15, 1952, the day after you got your National Guard status back, was Battery C of the 770th a federally recognized unit?

A. We were reverted back to the 770th Washington National Guard.

(Testimony of Captain M. G. Wubbens.)

Q. What I mean, as Battery C 770th Battalion of the Washington National Guard, you were still a federally recognized unit, weren't you?

A. As far as I know we were, yes, sir.

Q. Was Mr. Brown, William Brown, connected with Battery C of the 770th? A. He was.

Q. In what manner was he part of the Battery C of the 770th?

A. He was attached as the unit administrator and also as supply sergeant.

Q. Well, he was, prior to January, 1953, he was what is known as unit caretaker, wasn't he?

A. Unit caretaker. [172]

Q. And around January of 1953 didn't they change the designation "unit caretaker" to "administrative, supply and maintenance technician"?

A. Yes, sir, they did.

Q. Well, after January of 1953 was he the administrative, supply and maintenance technician of the Battery C of the 770th Battalion?

A. Yes, sir.

Q. How long did you continue in command of Battery C?

A. Oh approximately until August of that year, I believe, sir.

Q. August of 1953?

A. I believe right in there.

Q. Then you were Battery Commander of C Battery from July of 1951 until approximately July or August of 1953, and during that period from July of 1951 until July of 1952 this was, this

(Testimony of Captain M. G. Wubbens.)

battery and its battalion were on active federal military duty? A. Yes, sir.

Q. And then between July of 1952 and July or August of 1953 it was a National Guard unit?

A. Yes, sir, it was.

Q. Now at the time that this unit went from active federal military service to National Guard service, what [173] was done with its equipment, its trucks, its vehicles?

A. When we reverted from active federal service back to our National Guard service?

Q. Yes.

A. We left all our equipment with the parent unit that they just changed the name of the unit. We left our equipment with them. The 770th reverted to the 83rd Gun Battalion. They kept the equipment. We moved in name and men only back to National Guard Service.

Q. Where had you been in active duty, at Hanford? A. Yes, sir.

Q. When you came from Hanford to Seattle you brought men and nothing else, is that right?

A. That is correct, sir.

Q. Well, from that time on, from the time you got back to Seattle with men only, were you in the process of drawing new equipment?

A. We were, sir.

Q. Now in the spring of 1953, how many days a month did you hold National Guard drills?

A. We had drill night every Monday night, approximately four days of the month.

(Testimony of Captain M. G. Wubbens.)

Q. And that was always on Monday night?

A. As a rule, yes, sir.

Q. Now was Brown a sergeant in Battery C of the 770th? [174]

A. He was, sir.

Q. And as such would he report for drill each Monday night?

A. He did, sir.

Q. And was he required to report for drill in his military uniform?

A. He was.

Q. And did he so report always in his uniform?

A. He did, sir.

Q. What other duties, if any, did Brown occupy with reference to Battery C of the 770th?

A. In his military portion or civilian portion?

Q. As civilian portion.

A. He was the unit administrator and caretaker. He was the caretaker of that unit.

Q. I am going to call him a caretaker because it is easier to do so, but on the understanding that prior to January of 1953 he was officially designated as caretaker and that during and after January of 1953 he would be referred to as administrative, supply and maintenance technician. Is that agreed?

A. That is substantially correct, yes, sir.

Q. That is the way the fact was, wasn't it?

A. Yes, sir.

Q. Now are you familiar—were you familiar on or prior [175] to March 11, 1953, with the federal law and the army regulations and National Guard regulations relating to caretakers?

A. Basically I was.

(Testimony of Captain M. G. Wubbens.)

Q. Well, prior to and on March 11, 1953, did you prescribe any duties for Brown that were not his primary duties as unit caretaker?

Mr. Dovell I am going to object to this question. It calls for a conclusion and a legal one at that.

The Court: Well, that is what is going, the question that is going through my mind. I think you had better lay the groundwork for the matter in any case. It is not entirely clear to me what you have in mind. Do you understand what he means by the term "primary"? What is the term?

Mr. Casey: Primary duties as a unit caretaker.

The Court: Do you understand what he means by that term?

The Witness: By the term that he has—there is a set policy or set wording in, that they have set up that the man is responsible to do.

The Court: Yes.

The Witness: Knowing those verbatim I couldn't tell you, but I know just approximately what he was supposed to be doing.

Mr. Casey: Well, I might ask that [176] question, if your Honor please.

The Court: Yes, the thing about it is, you see, that the question assumes that he knows what you mean by that term and there might be some doubt about that. My own acquaintance with army regulations is there are a great many in them that even a seasoned and experienced officer wouldn't understand or know anything about.

(Testimony of Captain M. G. Wubbens.)

Mr. Casey: If your Honor please, I will withdraw the question and I will ask in its place:

Q. (Continuing): Prior to March 11, 1953, were you familiar with the primary duties of a unit caretaker? A. Yes, sir.

Q. What were those duties?

A. As caretaker, the care and maintenance of the equipment that the unit had, to take care of the personnel files of the men that we had to pick up and receive any organizational equipment assigned to us, and——

Q. Pick up where?

A. Any place that would be designated to receive these articles. Could be—Camp Murray was the normal supply station, but if there was a different station where we had to go to receive them, why he would go there.

Q. Well now, under—strike that. Did you ever prescribe any duties for Brown as a unit caretaker other than the primary duties that you have described? [177]

A. Oh, I suppose I could have at one time or another, not being able to recall specifically it would undoubtedly come under his orders that he was.

Q. Is there any doubt in your mind as to whether the drawing of equipment at Camp Murray was part of his primary duty as a unit caretaker?

A. That was one of his specific duties.

Q. Now in 1952 towards the end of 1952—I use the end of 1952 as a dividing point because you have

(Testimony of Captain M. G. Wubbens.)

some new regulation that comes out then, but at the end of 1952 in your table of organization, how many civilian personnel were allotted to your unit?

The Court Now when you say "unit" are you talking about the whole battery or the Company C?

Mr. Casey: I should make it more specific.

Q. (Continuing): Battery C of 770th.

A. Battery C under TO we had a hundred and six men and four officers.

Q. I'd like you to answer with reference to civilian personnel.

A. We were allotted before 1952?

Q. In 1952? A. 1952.

The Court: You mean after they were inactivated?

Mr. Casey: Yes. [178]

The Court: After you were relieved from active duty.

Q. July of 1952.

A. To the best of my recollection we were allotted two, but I only had one and then after that was changed specific to just one.

Q. Do I understand, to clarify it for the Court, is this correct, Captain, that according to Table of Organization for a National Guard company, specifically, Battery C, before January of 1953 they had an administrative assistant under Table of Organization and a unit caretaker?

A. Yes, sir.

Q. Is that correct?

A. That is correct.

(Testimony of Captain M. G. Wubbens.)

The Court: You had the positions on the TO but you didn't have the bodies?

The Witness: Yes, sir.

Q. And that one man was Mr. Brown, is that correct?

A. He could have been in my battery then.

Q. He was in Battery C for at least for six months prior, the last six months of 1952 he testified how far it was and it goes back some time, but at least he was in? A. He was there prior.

Q. So that those two Table of Organization positions that have administrative assistant and unit caretaker were [179] filled by Brown, is that correct? A. Yes, sir.

Q. Now do I further understand correctly that by virtue of a regulation, National Guard regulation, that came out early in January of 1953, supplemented by some additional stuff from the National Guard Bureau, that those two positions of the administrative assistant and caretaker were merged? A. They combined.

Q. Into what is called an administrative, supply and maintenance technician? A. Yes, sir.

Q. Was Brown that administrative, supply and maintenance technician in January, February, and March of 1953? A. Yes, sir, he was.

Q. And as such administrative, supply and maintenance technician, did his basic primary duties include the drawing of unit equipment from Camp Murray? A. Yes, sir.

(Testimony of Captain M. G. Wubbens.)

Q. Captain, in 1953, early 1954, what was your procedure regarding the drawing of equipment?

A. We drew equipment once a month from Camp Murray.

Q. Was there a set day when that was done?

A. Set day unless there was a specific route. We had a set day to go to Camp Murray and pick up our equipment. [180]

Q. Were orders issued regarding the picking up of that equipment?

A. Would you say that again?

Q. Were orders issued to pick up that equipment? A. Yes, sir, they were.

Q. Who issued the orders?

A. Those orders would come from Camp Murray stating that the equipment was ready to be received.

Q. And telling you to pick it up on that date?

A. Yes, sir.

Q. Were those orders issued to the caretaker?

The Court: You mean the paper itself, or—
Mr. Casey: No.

Q. (Continuing): Were the orders in their form directed to the caretaker to perform the duty of coming to Camp Murray to pick up the equipment?

A. It was directed to the commanding officer who would show it to the caretaker or it would be a verbal. We wouldn't specifically get the orders physically every time.

Q. But an order would be cut by Camp Murray, is that right? A. Yes, sir.

(Testimony of Captain M. G. Wubbens.)

Q. And then what would the unit caretaker himself get, what do you call it, VOCO? [181]

A. He would get verbal orders from the commanding officer. Not from the commanding officer every time, sometimes from the officer on duty at the armory.

Q. Are you familiar with the order under which Mr. Brown went to Camp Murray on March 11, 1953, to draw equipment? A. Yes, sir.

Q. Was that order directly in his capacity as unit caretaker? A. Yes, it was.

Q. Did the other unit caretakers of the battery go under the same order the same time to draw equipment? A. They did, sir.

The Court: About how long do you think you will be with Captain Wubbens?

Mr. Casey: Sir, I would say, golly, I will be at least twenty minutes and I am sure there will be cross-examination.

The Court: That is what I am concerned about. I'd like to accommodate you, Captain, so you wouldn't have to return but I am afraid it will be too long because I have another matter that I must attend to tonight also. So I think regretfully I will have to invite you back again tomorrow. And we will recess this case until tomorrow morning. Is the hour of nine-thirty agreeable to all of you? [182] Whether agreeable or not, that will then be the order of the day, nine-thirty. Did you have something?

Mr. Casey: I wonder if I might, on one brief

(Testimony of Captain M. G. Wubbens.)

point before we recess, your Honor, ask if, I'd like to offer the medical exhibits, the hospital records and X-rays by number at this time.

The Court: Well, they have all been admitted according to my record excepting 20 which is the one from St. Peters in Olympia.

Mr. Casey: I would like to offer 20 at this time, if your Honor please.

Mr. Rupp: No objection.

Mr. Dovell: No objection.

The Court: Very well, Exhibit 20 is admitted. So we now have 18, the map, 19, the group of ten prints and Officer, well the police officer and the 20, 21, and 22 of the various hospital records and X-rays, all those are admitted up to this date.

(Plaintiffs' Exhibits 18-22 admitted in evidence.)

All right now, Captain, you can step down if you will. We will recess this case until nine-thirty tomorrow morning. You gentlemen may now retire if you wish. Do so as quietly as you can while I attend to another matter here. It includes 17 as well. [183]

(Whereupon, at four-thirty-five o'clock the instant case was recessed and other matters considered until four-fifty o'clock p.m., at which time court was recessed.) [184]

April 12, 1955; 9:30 A.M.

CAPT. MARVIN GLEN WUBBENS

having been previously sworn on oath, was recalled as a witness on behalf of the Plaintiffs and testified as follows:

Direct Examination

(Continued)

By Mr. Casey:

Q. Captain, I believe at the close of yesterday's session I had asked you whether the unit caretakers of the 770th went down to Camp Murray together to draw equipment? A. They did, sir.

Q. And did they assist each other in the drawing of equipment for the entire battalion and the returning of it to Seattle? A. They did, sir.

Q. Captain, you stated yesterday that the unit had been on active duty, that is, in the active federal military service until about July of 1952, some nine months prior to this accident. Now during the time that the unit was on active federal military duty was it in the process of receiving the new 2½ ton trucks from the United States?

A. They were, yes, sir.

Q. Were they at that time, was the battalion at that time turning in its old 2½ ton trucks?

A. We were, sir.

Q. Was that in accordance with orders received from higher authority? [187] A. It was.

Q. Did you as battery commander of Battery C

(Testimony of Captain M. G. Wubbens.)

have any discretion in whether you turned in an old 2½ ton truck?

A. I was ordered to turn one in, yes, sir.

Q. And did the old 2½ ton truck or trucks that were turned in have the old low voltage electrical system? A. They did, sir.

Q. And did that low voltage electrical system on the 2½'s coincide with the voltage system on the four-wheel trailers? A. They did, sir.

Q. What was the purpose for use of the four-wheel trailers?

A. To haul our generators and to haul the electrical fire control equipment.

Q. Is that big equipment? A. It is, sir.

Q. Is that always, is that type of equipment always carried in these four-wheel trailers?

A. Standard, yes, sir.

Q. This four-wheel trailer differs from the usual trailer used by the military, doesn't it? Isn't the usual trailer a two-wheel trailer?

A. The two-wheel is a cargo trailer. [188]

Q. The two-wheel is what?

A. Cargo, sir, cargo trailer.

Q. And what was, and is, the vehicle that pulls the four-wheel trailer?

A. Two and one-half ton, sir.

Q. Now when you were on active duty and prior to the time that you—well strike that. In your battery when you were on active duty do you know how many of the four-wheel trailers you had?

A. I had four trailers that mounted generators

(Testimony of Captain M. G. Wubbens.)

and one trailer that mounted one director, total of six trailers.

Q. Well now, after you had started turning in the old 2½ ton trucks, when you were on active duty and you had received new 2½ ton trucks, those new 2½'s had the heavy voltage, the twelve or twenty-four volt electrical systems, didn't they?

A. They did, sir.

Q. Were you required while on active duty in the performance of your military mission to pull the four-wheel trailers with the six volt electrical system with the new 2½ ton trucks with the twelve or twenty-four volt electrical system?

A. Yes, sir.

Q. Did you at that time have any conversion units which would permit the electrical system of the trailer [189] to be fastened to the electrical system of the truck?

A. Not to my knowledge, no, sir.

Q. So that when you were on active military service with the unit were you pulling four-wheel trailers with 2½ ton trucks without any brake connection between them?

A. We did, sir.

Q. And was that necessary to perform your military mission?

A. It was.

Q. Do you know at about what time conversion units were received by your unit to hook the old 2½ ton trailer with the new two and a half ton truck?

A. Sometime in 1954, sir, if I recollect right.

(Testimony of Captain M. G. Wubbens.)

Mr. Casey: We have several questions of repetition.

Q. Can a jeep or quarter ton truck pull one of these four-wheel trailers?

A. It might be able to in an extreme case where you had to get, but as a standard rule it would be quite impossible to.

Q. You mean extreme emergency?

A. Extreme emergency.

Q. The drawbar level is different on the two isn't it?

A. The trailer would drag, sir. [190]

Q. What are the caretaker's hours of duty in say March of 1953?

A. From eight to four-thirty, sir.

Q. On the day of this accident, March 11, 1953, did Brown perform any duty that would be compensated for as drill time as a member of the Battery C?

A. During that day, sir?

Q. During that day? A. He did not.

Q. In the event that Brown were to have received an injury in the course of his duties as a caretaker, where would he have gone to receive medical treatment?

A. Marine Hospital, sir.

Q. In the event that Brown had received injuries in the course of his duties as a National Guardsman during the drill time which you had once a week, where would he have received medical treatment?

A. Emergency medical would be received at

(Testimony of Captain M. G. Wubbens.)

Fort Lawton and then he'd be evacuated to Madigan.

Q. Madigan?

A. Madigan General Hospital.

Q. Madigan General Hospital at Fort Lewis?

A. Yes, sir.

Q. On the date of the accident was it necessary to perform your military mission that the four-wheel trailer [191] with the six volt electrical system be pulled by the 2½ ton truck with the twelve or twenty-four volt electrical system?

A. That is all we had, sir.

Q. Is your answer yes? A. Yes, sir.

Q. What was the purpose of your obtaining the equipment that was being returned to your unit in Seattle at the time of the accident?

A. The piece of equipment that was on the trailer was our director and we were preparing to go to Summer Encampment for firing practice.

Q. Just very briefly, what is a director?

A. It is the computer and director that is the gun laying equipment that points the gun at the moving target. It computes the problem.

Q. In other words, without that you can't hit the target, isn't that about it?

A. That is about it, yes, sir.

The Court: Used to hit them before they had those things, but it helps.

Mr. Casey: I have no further questions.

The Court: Cross-examine Mr. Dovell. [192]

(Testimony of Captain M. G. Wubbens.)

Cross-Examination

By Mr. Dovell:

Q. Captain, the hospital at Fort Lawton and the hospital at Madigan are both army hospitals?

A. Yes, sir, they are.

Mr. Dovell: That is all.

Mr. Rupp: I have none.

The Court: That is all, Capt. Wubbens, you are excused and may leave at your pleasure. Call another witness please.

(Witness excused.) [193]

* * *

GENERAL WILBURN H. STEVENS

being first duly sworn on oath, was called as a witness on behalf of the Plaintiffs and testified as follows:

Direct Examination

By Mr. Casey:

The Clerk: State your full name and spell your last name.

The Witness: Wilburn H. Stevens, S-t-e-v-e-n-s.

Q. Will you state your address, sir?

A. Camp Murray, Fort Lewis, Washington.

Q. Are you a member of the Armed Forces?

A. Yes.

Q. In what capacity, sir?

A. As the Adjutant General of the Washington National Guard.

(Testimony of General Wilburn H. Stevens.)

Q. And what rank do you carry?

A. Major General.

Q. Do you carry the commission in the United States Army?

A. In the Army of the United States.

Q. What is the nature of that commission, sir?

A. I am federally recognized at the present time as a Brigadier General and the papers are in for recognition as a Major General.

Q. And in your official capacity at this time, sir, is what? [194]

A. As the supervision and training of the Washington National Guard under the direction of the Governor.

Q. As the Adjutant General of the Washington National Guard? A. Yes.

Q. And did you, sir, occupy that same position—strike that. How long have you been, occupied that position continuously?

A. Since 1 August, 1949.

Q. Sir, I wonder if you could tell us about the manner and nature of hiring of civilian personnel known as unit caretakers such as the position occupied by Sergeant Brown of Battery C of the 770th Anti-Aircraft Battalion in March of 1953?

A. We are authorized a certain number of civilian technicians by Table of Organization from the National Guard Bureau. The specifications for this type of man for the particular job is set up by the National Guard Bureau under the direction of the Department of the Army and usually the unit com-

(Testimony of General Wilburn H. Stevens.)

mander selects a man from his unit because the man, if he is to act in the capacity of the caretaker, he must be in the unit where he takes care of the property. Therefore, the unit commander is usually the man who hires the man and the papers are sent forward to my headquarters. [195]

Q. Would it be proper to say the unit commander recommends the hiring of him, sir?

A. I think that would probably be better. There are—we have a personnel officer who interviews the man insofar as qualifications are concerned and makes certain that he fits the specification for the particular job.

Q. What part does the United States Property Disbursing Officer have in the selection of this man?

A. Well, the officer who is the personnel officer is a part of the people who are to assist him in his job and he is the man who interviews the applicant.

Q. Personnel officer assists the United States Property and Disbursing Officer?

A. That is right.

Q. Just what is the status of the United States Property and Disbursing Officer—I think you refer to him as U.S.P. & D.O.?

A. United States Property and Fiscal Officer at the present time.

Q. Fiscal Officer it is known? What is his function and purpose?

A. Well, he is a National Guard officer of the certain qualifications who is recommended to the Department of the Army through the National

(Testimony of General Wilburn H. Stevens.)

Guard Bureau to be called to active duty to serve in that capacity for the State of [196] Washington.

Q. Well, when you say called to active duty, when he is on active duty is he in the active federal military services?

A. He is in the Army of the United States.

Q. Now where do you get—where do you obtain your authority with reference to the hiring of these caretakers?

A. From the National Guard Bureau.

Q. And that in turn comes from the federal statute, does it?

A. The National Guard Bureau is a part of the Department of the Army set up to supervise the National Guard.

Q. Do you in your establishment hire civilian personnel directly under the authority of the Governor?

A. Yes, we have about sixty-five people at the present time.

Q. Now those sixty-five people, are they separate so far as hiring and firing from the caretakers? A. They are.

Q. And would the Governor through you have full and absolute and final authority to fire these sixty-five civilian personnel? A. He would.

Q. Would the federal government have any control over that firing function? [197]

A. Not of the state employees.

Q. Not of that sixty-five, approximately sixty-

(Testimony of General Wilburn H. Stevens.)

five employees? A. No.

Q. Does the federal government exercise any jurisdiction over the firing of the unit caretakers?

A. That authority is delegated to me through federal orders.

Q. And that is entirely separate from the sixty-five civilian employees that you hire?

A. That is right.

The Court: That is not entirely clear to me, General Stevens. You mean that, with respect of these unit caretakers that you have some separate authority with respect of hiring and firing separate that is from the authority you derive through the Governor?

The Witness: Yes, sir, that is set up by federal statute.

The Court: Do you get that authority by virtue of your capacity as an officer in the Army of the United States, or do you get it by virtue of your capacity as Adjutant General of the Washington National Guard?

The Witness: Well I would say both, sir. You see I hold a dual status.

The Court: Yes, I understand you have "two hats." [198]

The Witness: That is right, sir.

The Court: What I am concerned about at the moment is with respect of your authority over unit materiel caretakers. Is there a clear, sharp division of your authority there stemming in the one case from your capacity as an officer of the Army of the

(Testimony of General Wilburn H. Stevens.)

United States as distinguished from your capacity as an officer of the State of Washington?

The Witness: I would say so, sir. You see these people are hired, the salary range and the specifications and everything comes from the National Guard Bureau and in general the ratings and so forth are very similar to civil service. In fact they follow the civil service scale pretty close although they are not civil service and the handling of those particular employees who are paid from federal funds is carefully laid out in regulations.

The Court: Thank you, go ahead, excuse the interruption.

Q. I wonder, sir, if you could explain briefly the distinction between, or the problem of changing from one to the other on this unit materiel caretaker and administrative, supply and maintenance technician?

A. Well, that is a little difficult, but I will try. Prior to the change we had two men, Table of Organization that is, for permanent employees paid from federal [199] funds allowed us two men per battery or company. A survey indicated that it wasn't necessary to have two people so we made—except in certain units where they had a tremendous amount of equipment.

Q. Did the federal authorities make that survey?

A. That is right, and they decided to change and take away one man with the exception of a few companies, very large companies with a tremendous amount of equipment, and change the

(Testimony of General Wilburn H. Stevens.)

name of the man who occupied the job since he would not only do mechanical work, but he would do clerical work as well.

Q. And the name they assigned was administrative, supply and maintenance technician?

A. That is right, about fifty per cent of his work is, or maybe more, is taken up with keeping the papers in order.

Q. Now, sir, I notice in some of the directives and regulations a reference to primary duties of a caretaker or administrative, supply and maintenance technician—and I think I will refer to him for brevity as a caretaker although we know he is something else after January, 1953. I notice reference to primary duties of the caretaker and additional duties of the caretaker. What, as of the time of this accident, March 11, 1953, what were the duties of this caretaker? [200]

A. Well, to enumerate them entirely would be most difficult.

Q. Generally speaking as to the primary, primary duties in a broad form?

A. Well, he was responsible for——

The Court: Are you speaking now of primary? You left the word “primary” out.

Mr. Casey: I left that out.

Q. And I should clarify it, General. My question is with reference to the primary duties of the caretaker in March of 1953?

A. Well, he was to take care of all of the property issued to that battery and take proper pre-

(Testimony of General Wilburn H. Stevens.)

cautions, preserving the materiel. For instance, you have a great deal of wool. You have to put moth-balls in it. If you have ever walked into an army supply room you will know. He had a great number of weapons that required constant attention and they have to be cleaned and oiled and things of that kind. And of course the vehicles, his primary duties was to do what we term first echelon maintenance, that is, keep proper amount of air in the tires, the battery, sufficient amount of water in it, and that sort of thing, and he was to take care of the necessary paper work which comes to every battery office along—he was the right-hand man to the unit commander in getting this paper [201] work accomplished. Payrolls, morning reports, sick report, report of change and a thousand and one reports which are required which the company commander, being only a part time man, he can't take care of that. Usually they meet together and decide what work is to be done and it is laid out and the caretaker or technician goes ahead and completes the work for which the unit commander inspects it, signs it and it goes forward.

Q. State whether the receipting for and obtaining of equipment from the National Guard headquarters was a part of his primary duty?

A. It was.

Q. Is there any question but what that was part of his primary duty? A. None in my mind.

Q. What was the general procedure by which equipment was drawn by the units?

(Testimony of General Wilburn H. Stevens.)

A. Well, we have a large truck, a van which is pulled by a tractor which makes a monthly tour of the state and delivers considerable quantities of equipment and supplies. However, we found it necessary for the unit caretaker to come in on an average of about once a month in order to keep clothing and other supplies in sufficient quantities for the unit, and therefore draw-days were set up for each unit and they came in on that particular [202] day and drew their equipment and supplies. Now in the case of a change of equipment that was set up usually as a special day as I think it was in this case.

The Court: Counsel has an order, it will only take a moment to sign. (Referring to another matter and other counsel.) The witness can be examining whatever you wish.

(Whereupon, the other matter was considered and the instant case resumed.)

The Court: Go ahead, Mr. Casey.

Q. Sir, you have been handed Plaintiffs' Exhibit 16 entitled——

Mr. Casey: I wonder if I might——

The Court: Yes, go ahead.

(Whereupon, counsel approached the witness.)

Q. (Continuing): ——entitled “Revised Field Civilian Personnel Program, Project 1213, Issued 22 December, 1952, by Departments of the Army and the Air Force, National Guard Bureau, Wash-

(Testimony of General Wilburn H. Stevens.)

ington, D. C.," and directed to the Adjutant Generals of the various states. Now I will ask you, sir, whether the listing of duties on the last two pages of that ten or fifteen-page document lists the basic, the primary duties of the caretaker? I think it is the last two pages that refer to it, which are headed "Administrative, Supply and Maintenance Technician." I wonder if you [203] could locate that, sir, if you haven't already, and tell us whether that shows the primary duties of this caretaker or technician? A. Yes, it does.

Q. I believe on the first of those last two pages, sir, reference is made to the receipt, receipting for equipment. I wonder if you could glance through and find that portion? I have the same thing.

A. Yes, it is paragraph 2, "Responsible except during field training periods, to that commander for the receipt, care, maintenance and repair of unit equipment."

Q. Sir, what interpretation is placed on the term "receipt" in that instance?

A. Well, he might sign a temporary receipt for a vehicle although the final papers would have to be signed by the unit commander since he is charged with all of that, but he could go to my headquarters and make a temporary receipt for certain equipment and take it back to the unit where it would be checked by the company commander and later he would sign a permanent receipt for it.

Q. In other words, is it understood by the term "receipting for equipment" that it is determined

(Testimony of General Wilburn H. Stevens.)

that he goes from his unit to Camp Murray to obtain and receipt for equipment?

A. Yes. He cannot sign a permanent receipt because [204] he is not an officer. The unit commander signs for all property of the unit.

The Clerk: Plaintiffs' Exhibit number 23 has been marked for identification.

(Plaintiffs' Exhibit 23 marked for identification.)

Q. Sir, handing you what has been marked Plaintiffs' Exhibit 23 for identification, being National Guard Regulation number 75-16 from the Department of the Army dated 7 January, 1953——

Mr. Casey: I might say, your Honor, that it is that which your Honor was handed at the beginning of the trial.

The Court: The same I have, 75-16?

Mr. Casey: Yes, your Honor, and 7 January, 1953.

Q. (Continuing): I will ask you, sir, whether the regulation that you have just been handed is the changed regulation relative to the caretaker or supply maintenance technician?

A. This is the current regulation which governs our federal civilian personnel program.

Q. And the paper we handed you just a few minutes ago, batch of papers, Plaintiffs' Exhibit 16, does that expand or carry into effect the regulation, the 75-16 that you have just been handed? [205]

A. It supplements. Oftentimes they come out

(Testimony of General Wilburn H. Stevens.)

with a change in this form before it comes out in this form, a permanent form.

Q. Comes out in pamphlet form before it comes out in——

A. Oftentimes this method is used to supplement as well, supplement information.

Q. Now those directives are coming to you from the Federal Government, are they not?

A. Yes, Department of the Army.

Mr. Dovell: I must object to the word “directives” at this stage, your Honor.

The Court: Beg pardon?

Mr. Dovell: I object to the word “directive.”

The Court: Well, I have lost it.

Mr. Dovell: I think this is supervisory information and not a command.

The Court: Well, you will have to bring that out on cross I think at this point.

Q. Sir, to your knowledge, are the unit caretakers, particularly are unit caretakers of the 770th given any duties to perform that are not primary duties set forth or derived from the regulation 75-16?

A. Well, not to my knowledge. The man wouldn't have to do the work if it was against the rules. [206]

Q. Well, has your headquarters designated any additional duties to be performed by that caretaker, any duties in addition to what he is required to do by the federal regulation?

A. Not to my knowledge.

(Testimony of General Wilburn H. Stevens.)

Q. Are you familiar with the practice—strike that.

Are you familiar with the procedures in other states and territories and the District of Columbia for picking up of equipment by the unit, that is, the battery or battalion level from the state National Guard headquarters?

A. Well, the system is similar all over and the duties insofar as I know they do exactly the same thing in drawing equipment in all of the states and territories as they do in my own.

Q. Well, in the rest of the states and territories and so far as you personally know, do the caretakers of the battalion of the individual units pick up the equipment or much of the equipment from the state guard headquarters?

A. National Guard Headquarters?

Q. National Guard Headquarters, excuse me.

A. Yes, they do. In some cases for instance in the state or the U.S.P.&D.O. and U.S.P.&F.O. office is not located near the Adjutant General's office. You have that little difference but they do go in the U.S.P.&F.O.'s office in order, and draw the equipment the same as they [207] do now, but it is not near the Adjutant General's office.

Q. How does the equipment get to the U.S.P.&D.O. office to some place up above?

A. F.F. it is on automatic issue. You see each organization is set up with a Table of Organization for personnel and the Table of Equipment. This Table of Equipment prescribes the equipment for

(Testimony of General Wilburn H. Stevens.)

that unit. Much of it is automatically issued by the Department of the Army and comes to the U.S.P.& F.O. and it is earmarked, marked right on the vehicles, we will say, or guns, to what outfit to go.

Q. Even down to the battery level?

A. Oh, yes, and on other supplies is largely by requisition.

Q. Now, your vehicular equipment, your big trailers, your computers, things of that nature, would they come from the Federal Government earmarked for the unit?

A. That is right, automatic issue.

Q. In other words, you don't have anything to say about it, you have a Table of Organization, you have a Table of Equipment. If the unit does not have a certain item if required under the Table of Equipment it automatically comes down?

A. That is right.

Q. That comes down from the Federal Government? [208]

A. They occasionally make a mistake, they don't give us all the equipment. Then we of course could make a special requisition, but as a rule, as a rule it is automatic issue.

Q. And such items as computers and big trucks and big trailers are automatic issues, is that right?

A. That is right.

The Court: Is the equipment the same for a National Guard unit as for an Army, regular Army unit?

(Testimony of General Wilburn H. Stevens.)

The Witness: Yes, sir, the law requires that we must conform to Army standards of training, use the same equipment, same Tables of Organization.

The Court: What was the 101—was it, table for equipment? I can't remember the number of it now.

The Witness: Well, each organization has a little change in its Table of Organization. If it is artillery it has one, if it is tanks it has another and so forth.

Q. Sir, what is the means by which the United States determines whether the National Guard is properly performing its mission?

A. By various methods. First we have certain officers detailed to the state and to each unit.

Q. Will you describe them, their function?

A. They are the Army Advisory Group and they are headed by a Colonel, whose office is in my headquarters, [209] and each unit has officers and non-commissioned officers assigned to this instructor group who constantly supervise their training.

Q. They are regular Army officers?

A. They are regular Army officers detailed for that purpose. Once each year, at least once each year we have an inspection of each unit by an inspector general of the Army who makes a detailed report on that unit.

Q. He is not in any way connected with the National Guard?

A. Not in any way. He comes from Sixth Army as a rule, detailed from Sixth Army, San Francisco. In addition to that we have various teams

(Testimony of General Wilburn H. Stevens.)

who come in from the big depots like for instance the signal team to examine all items of signal equipment, engineering team to examine items of engineering equipment, quartermaster team to examine items of the quartermaster and so on.

Q. How about caretakers' teams, come in and examine caretakers, sir?

A. Well, on any of these inspections if there is anything very much wrong the caretaker is the man who is in the bite of the line.

Q. I will ask you, sir——

The Court: All teams inspect him, in other words? [210]

The Witness: Yes, sir.

Q. (Continuing): I will ask you, sir, whether the inspection procedure in the regulations prescribing inspection procedure don't prescribe specifically for inspection of the caretakers by the inspector general's department?

A. Yes, I believe they do. I am not absolutely certain on that point.

Mr. Casey: I wonder if we might see Exhibit, Government Exhibits 2 and 3 and 4.

The Clerk: Should be referred to as A-2, A-3 and A-4.

Mr. Casey: I might say to your Honor that in accordance with the pretrial order insofar as Government Exhibits were concerned, that the order provides that as to Defendant United States of America's exhibits marked for identification as 2 through 6, inclusive, it is stipulated that they are

(Testimony of General Wilburn H. Stevens.)

what they purport to be and as to the portions admissible, if any, may be admitted without further proof, and then it proceeds to list these various envelopes.

The Court: Yes, I recall that. Do you want them admitted at this time?

Mr. Casey: If your Honor please, insofar as Defendant United States' Exhibit A-2 is concerned, we will offer it with this statement, that some of the regulations [211] therein stated may not be in force at this time and there are very numerous and various regulations, many without any relation to the other, but we would offer Defendants' Exhibit A-2.

The Court: Well——

Mr. Dovell: I am offering——

The Court: A-2 consists obviously of a large number of regulations. It would be quite apparent that only a very small fraction of them could possibly have any relevance to this case, I would think.

Mr. Casey: That is correct.

The Court: But for the purpose of convenience as far as I am concerned you can admit the whole thing with the understanding that if anybody can find anything in there that is relevant and was in force and effect at the time of the accident, why we will consider that and the rest of it we won't.

Mr. Casey: That is correct, your Honor.

The Court: But I am certainly going to rely on counsel to point it out. I don't intend to spend the evening going through that voluminous material.

(Testimony of General Wilburn H. Stevens.)

Mr. Casey: We are offering A-2.

The Court: It is admitted.

(Defendant's Exhibit A-2 admitted in evidence.) [212]

Mr. Casey: Now with reference to Defendant United States of America's Exhibit A-3, we will offer that with the exception of the large pamphlet at the rear of this collection of regulations which is entitled "Air National Guard Regulations, Department of the Air Force, Washington 752" which has nothing whatsoever to do with the matter in issue, so we would offer——

The Court: I can't tell that, but so far as I am concerned you can put——

Mr. Dovell: That is satisfactory to the Government, your Honor. That hasn't anything to do with it but at the same time it is in the same office so it had to be certified.

The Court: Why don't you take it out at a convenient time, take it out?

Mr. Dovell: Certification is made upon all the documents that are contained in that.

The Court: Physically remove the thing at some convenient time because we are going to have enough material in this record that is not pertinent without adding further, so if you both agree that it has got nothing to do with it, why take it out and you can keep it as a souvenir or read it for your vacation this summer or something of that kind.

Mr. Casey: Thank you, your Honor. [213]

(Testimony of General Wilburn H. Stevens.)

The Court: All right.

Mr. Casey: Is it so admitted on that?

The Court: Yes, it is.

(Defendant's Exhibit A-3 admitted in evidence.)

Mr. Casey: I believe your Exhibit 4 contains——

The Court: It would be A-4, of course.

Mr. Casey: Excuse me, Government's Exhibit A-4, that contains older regulations on the same thing.

Mr. Dovell: I think that contains that NGB circular 4 which many of the cases refer to.

Mr. Casey: Yes, although not in force at the time, it would undoubtedly be helpful to the Court because some of the prior cases were decided with reference to that.

The Court: I see.

Mr. Casey: With that understanding we will offer Defendant's Exhibit A-4.

The Court: All right, let's admit it under the same understanding. It is admitted and it will be incumbent upon counsel to point out those portions of it that the Court should consider.

Mr. Casey: Thank you, your Honor.

(Defendant's Exhibit A-4 admitted in evidence.)

The Court: Is there anything further of General [214] Stevens?

(Testimony of General Wilburn H. Stevens.)

Mr. Casey: Yes, your Honor, I wanted those so I could speak to him about regulations.

The Court: Very well.

Q. Directing your attention, sir, to the Department of the Army, S.R., what is an S.R.?

A. Special regulations.

Q. Department of the Army Special Regulation 20-10-8 issued July 21, 1949, if you like, sir, I will read it:

“Special Regulation 20-10-8, 21 July, 1949.”

In paragraphs 7 and 8, pages 7 and 8, subparagraph 12, entitled “Administrative Assistant”:

“With respect to the administrative assistant the inspector general should ascertain whether (a) the position has been specifically authorized, (b) he has proved himself qualified in the job specifications for this position, (c) additional duties interfere with his primary duties, (d) he works the required number of hours, (e) his federal pay is within the prescribed limits, (f) he shares his pay with others which is contrary to regulations.”

Then subparagraph 13 following that directly entitled “Caretaker.”

“With respect to the caretaker the matters [215] to be determined are the same as those required with respect to the administrative assistant.”

Are you generally familiar with those requirements and regulations as applicable to the inspector general?

A. Not generally, no. I am certain that if they

(Testimony of General Wilburn H. Stevens.)

found any irregularities it certainly would be in the inspector general's report. I am certain of that.

Q. Now, how often does the inspector general inspect the National Guard?

A. Each unit once each year unless the unit should be shown as unsatisfactory. Then it is given a six-month probationary period and reinspected by the inspector general. If it is not satisfactory at that time or better, federal recognition is withdrawn.

Q. With respect to inspection of the caretakers by the inspector general and the inspector general's reports, what happens to the written report prepared by the inspector general?

A. Well, the, the regular report is sent to the unit showing all of the discrepancies noted and commendations and so on, and so forth. The unit must endorse that back through my headquarters to the headquarters who sent out the inspector general giving their reasons why they were wrong or had failed to comply in certain places and [216] what they were going to do about it and how long it takes to correct the deficiencies. That is received in my headquarters and we further endorse it that we will see that they do the things they said they were going to, and mail it on forward to the inspector general's office.

Q. Now, does that inspection by the inspector general also include the inspection of the vehicles, trucks, trailers themselves?

A. That is right.

Q. Down to whether they are operating in

(Testimony of General Wilburn H. Stevens.)

proper condition? A. (Nods head.)

Q. Brake connections?

A. Well, there had been some doubt in my mind as to whether, unless this inspector general happened to be looking for that particular thing, as to whether he would take a special look at this thing, especially at a time when they were just changing over. He might or he might not.

Q. Well, all of these inspector general reports in any event come over, through your desk, do they not? A. That is right.

Q. Well, prior to this accident on March 11, 1953, have you ever been told by a representative of the inspector general's office, Department of the Army, or have you ever [217] seen any report made by the inspector general's department of the regular Army criticizing the units of the Washington State National Guard or your headquarters for your use of the unit caretaker?

A. We have never, we have never been, we have never had any difficulties that way.

Q. You have never received any criticism?

A. No, we haven't had any.

Q. Have you ever been advised orally or in writing by the inspector general's department regarding additional duties being performed by unit caretakers? A. Not to my knowledge.

Q. Well, if there were such an objection it would be brought to your knowledge, would it not?

A. It probably would be with the exception that I am gone sometimes and the assistant adjutant

(Testimony of General Wilburn H. Stevens.)

general handles affairs while I am gone. It is possible but I think hardly probable that such a thing occurred.

Q. Highly unlikely would be perhaps a way to phrase it. A. Unlikely.

Q. Well, now, I believe a little while ago before I started off at a tangent, we were talking about the advisory personnel both in your headquarters and in the units who were regular army personnel there in advisory [218] capacity, is that correct?

A. That is right.

Q. Now, do those advisory personnel, are they familiar with the duties of these caretakers?

A. Yes.

Q. Are they familiar with the duties of the people in Camp Murray issuing equipment?

A. Yes.

Q. Do they maintain a pretty close look at all of those functions? A. Yes, they do.

Q. Do you know of your own knowledge whether those advisory personnel, regular army personnel on and prior to March of 1953 knew that unit caretakers were coming to Camp Murray to pick up equipment? A. They did.

Q. Did you ever hear any objection either orally or in writing from any of those regular army supervisory personnel? A. None.

Q. Now, with reference to medical care and treatment for unit caretakers, what generally is it? Do the regulations provide in that regard?

A. Well, if he is near a federal installation he is taken care of there and in small towns like, we

(Testimony of General Wilburn H. Stevens.)

will say, [219] Wenatchee, Okanogan, places like that, there are certain doctors which are named to which he may go in case of injury or sickness.

Q. Is there a written directive that says that if the federal civilian personnel, these caretakers, are injured in the course of their duties as a caretaker at, say, Ellensburg, is there a list of doctors in Ellensburg to whom they will go?

A. That is right.

Q. And what will that doctor do with his bill?

A. It will be sent to the U. S. P. & F. O. for payment, who will process it.

Q. Now, let's assume that a National Guardsman in the course of his duties as a National Guardsman on drill time or, yes, when he is getting actual pay for drill time is in Ellensburg and he is injured, what happens to him?

A. He would be taken care of by any doctor that could be gotten as quickly as possible and would be sent to the nearest hospital if it were serious enough regardless of where it might be, and as soon as possible be transferred to Madigan Hospital.

Q. Would that National Guardsman in my latter example be going to the doctors who are on this list prescribed for caretakers?

A. Well, not necessarily. In a small town, it may [220] be the same one, but not necessarily. The whole thing is handled——

Q. Any doctor for the National Guardsman, is that correct?

A. That is right.

(Testimony of General Wilburn H. Stevens.)

Q. But the specific doctors on the list for the caretakers?

A. No, he wouldn't be required to go to those; any doctor.

Q. The National Guardsman wouldn't be required to go to those? A. That is right.

Q. Now, in Seattle, assuming that a unit caretaker were injured while in the course of his duties as a unit caretaker, where would he go?

A. Well, I believe the installation is the Marine Hospital named in that city.

Q. That is designated in some directive or regulation that comes down from Washington, D. C., isn't it? A. That is right.

Q. Now, sir, what is the status of property, let's say trucks, 2½-ton trucks that are in the possession of the Washington National Guard, under what circumstances are they there?

A. Well, the National Guard must be equipped the [221] same—must conform to the same Table of Organization, it may be reduced slightly, and the same Table of Equipment as the regular Army in the event of an emergency so that it fits right into the army organization.

Q. Is it a proper statement to say that equipment is loaned to the National Guard by the United States?

A. No. Yes and no, perhaps. To make that a little clearer I might say that the Congress appropriates money to the Department of the Army for the procurement of National Guard vehicles

(Testimony of General Wilburn H. Stevens.)

for the use of the National Guard. We are a little better off than the other reserve components in that this money is earmarked and must buy equipment for it. That is why we have it instead of their spending it in some fort instead of taking care of their reserves. And it is earmarked for the National Guard.

In the event of an emergency such as the Korean emergency, they withdrew about fifty per cent of the National Guard's equipment and used it in the army. They had to have it.

Q. When equipment in possession of the National Guard becomes obsolete or wears out, referring specifically to trucks and heavy equipment, where does it go?

A. Well, it is returned to the regular army. For instance, in the case of our trucks here they were turned in to Mt. Rainier Ordnance Depot. [222]

Q. That is the regular army depot, is it?

A. That is right.

Q. Well, now, regarding this question on trucks being turned in, are you familiar with regulations requiring the turn-in of World War II 2½-ton trucks some time in the last several years?

A. Yes.

Q. Well, up until say 1952—to shorten this a little bit—you had 2½-ton trucks with a low voltage electrical system, did you not?

A. Six volt, I believe.

Q. That might be. I think there is a little bit of

(Testimony of General Wilburn H. Stevens.)

confusion on the six-volt thing that Col. Hagen can clear up.

Mr. Casey: I might just say at this time, without attempting to testify, that we have talked in the pretrial order of, have referred to the old equipment as having six volts and the new equipment as having twelve. Now I am advised that what is meant by that is that when we say twelve now, we mean that these new vehicles have two twelve-volt batteries which are hooked up in series together, and I assume that that means a total of twenty-four volts. Now Col. Hagen can clear that up because he is the man right next to it and it may be that the former trucks were two sixes, making it twelve, although we are a little [223] indefinite on that until he gets here, but in any event the new truck is double what the old trucks were, whatever that might happen to be.

Q. (Continuing): Now, did you receive an order from the Department of the Army regarding the turn-in of the old 2½-ton trucks with the low voltage? A. We did.

Q. Now, the old 2½-ton trucks were the low voltage, they were used directly to haul when they were hauling trailers, to haul these trailers, were they not? A. They were.

Q. And were there brake connections between the old truck and the trailer? A. There was.

Q. Were those electrical brake connections?

A. They were.

Q. Did they have some type of conversion unit

(Testimony of General Wilburn H. Stevens.)

which permitted those electrical connections on the truck and trailer to be fastened together and operate together?

A. They were unnecessary conversion on the old trailer. The brakes on the trailer in the old system worked together without conversion.

Q. And under that braking system, would the driver in the cab of the truck apply the brake and would that brake affect equally the wheels on the truck and the trailer? [224]

A. So far as I know it did, yes.

Q. Do you know about what time the order was received requiring the turn-in of equipment, the 2½-ton trucks?

A. I don't remember, but it seems December of 1952 as near as I can guess.

The Clerk: Plaintiffs' Exhibit Number 24 has been marked for identification.

(Plaintiffs' Exhibit 24 marked for identification.)

Q. Sir, handing you Plaintiffs' Exhibit 24 for identification, which is a photostatic copy of what purports to be a Department of the Army and Air Force National Guard Bureau directive from Washington, D. C., dated 14 March, 1952, entitled "NG-ARLR 451, General Subject, Replacement of World War II Vehicles," I will ask you whether after you have examined it, whether that is the order that was received from the United States of America directing the turn-in of old World War

(Testimony of General Wilburn H. Stevens.)

II 2½-ton trucks? A. Yes, it is.

Q. And was that order received by you immediately after its issuance?

A. Well, I don't know exactly how soon it was received, but ordinarily within two weeks of the date.

Q. And upon receipt of that order from the United States of America, did you proceed to comply with it? [225] A. We did.

Q. Was there any change made at that time by the United States of America in the Table of Equipment for the units?

A. I don't know of the specific changes. There may have been some.

Q. Would it require a change of Table of Equipment to get a new truck from an old truck?

A. Well, not necessarily.

Q. Just be a turn-in of one and a picking up of the other, is that about it?

A. If there was any extra equipment that came with it, it would require a change.

Mr. Casey: We will offer Plaintiff's Exhibit 24.

Q. Sir, in the, upon the turning in——

The Court: Any objection?

Mr. Dovell: Your Honor, these exhibits were supposed to be available at the time of pretrial order to be examined, but I haven't any objection.

The Court: Very well, 24 is admitted.

(Plaintiffs' Exhibit 24 admitted in evidence.)

(Testimony of General Wilburn H. Stevens.)

Mr. Casey: I might say we didn't know about it ourselves at that time.

The Court: It is all right. It is all right, [226] go ahead.

Q. (Continuing): Sir, directing your attention to this paragraph in Plaintiffs' Exhibit 24, paragraph 3, which states:

"The 259 World War II trucks, 2½-ton cargo, presently on hand, will be utilized by units of your state for summer field training. Upon completion of summer field training and not later than 31 July, 1952, these trucks will be shipped to Mt. Rainier Ordnance Depot."

I will ask you whether that order was carried out by you?

A. To the best of my knowledge it was.

Q. Did you have any discretion in the carrying out of this order dated, which is Plaintiffs' Exhibit 24?

A. None whatsoever.

Q. I note that paragraph 6 of Plaintiffs' Exhibit 24 requires also the turning in of spare parts, tools, accessories, modification kits, equipment, winterization units to ordnance distribution depot. Was that carried out?

A. It was to the best of my knowledge.

Q. Well, then, what were these two, what replaced these 259 World War II 2½-ton trucks?

A. New trucks became, were being shipped to us later.

Q. Now, with the—strike that. Did the 259

(Testimony of General Wilburn H. Stevens.)

World War II [227] 2½-ton trucks referred to in Plaintiffs' Exhibit 24 comprise substantially all of the 2½-ton trucks you had of the old trucks?

A. All that remained. You see, we had given about fifty per cent of our trucks back to the army prior to that for use in the Korean situation and so far as I know that was, that constituted what remained in the Washington National Guard.

Q. March 14th you still had 259 old 2½-ton trucks and those you had to turn in by July 31, 1952? A. (Nods head.)

Q. Now, these 259 trucks we are talking about, they were the low voltage electrical system trucks, is that correct? A. That is right.

Q. Now, did you retain the old trailers that you had?

A. We had many of the old trailers and especially trailers of the type which carried detectors generally.

Q. In other words, the big four-wheel trailers, those were kept? A. Right.

Q. You were not ordered to turn those in, were you? A. No.

Q. Well, now, when you received—or did you start receiving the replacement 2½-ton trucks immediately after you [228] turned in the old ones?

A. I believe we received some before we got rid of all the old ones. As I remember it we received quite a goodly number before we turned in all the old trucks and the rest afterwards.

(Testimony of General Wilburn H. Stevens.)

Q. You were in the courtroom while Capt. Wubbens was testifying this morning, were you?

A. Yes.

Q. Did you hear his testimony that during the active federal military service of the 770th at Hanford, prior to, I guess it ended in July of 1952, that prior to that time they had turned in some of the old 2½ tons with the low voltage and had received some of the new 2½ tons with the higher voltage?

A. Yes, that is true, but the army received the equipment ahead of us and he was in the regular service at that time.

Q. Oh, I see. Well, now, the——

The Court: Is that a good breaking point?

Mr. Casey: Any time.

The Court: I think we ought to have a little recess. We will have a little recess now of about ten, fifteen minutes, something of that kind.

(Whereupon at 10:40 o'clock a.m. a recess was had until 10:55 o'clock a.m. [229] at which time respective counsel being present, witness Stevens resumed the stand for continued direct examination by Mr. Casey, and the following proceedings were had, to wit.)

The Court: Ready to proceed? Go ahead.

Q. At the close of the session we were discussing this change-over equipment. Upon issue to the National Guard by the United States of the new 2½-ton trucks with the higher voltage, were you re-

(Testimony of General Wilburn H. Stevens.)

quired to use those trucks to perform your mission?

A. We were.

Q. Were you ordered to use those trucks by the United States in the performance of your mission?

A. Well, there was not a specific order but we are required under the law to train these troops the same as they are trained in the regular service and to use the same equipment, so under that, with that particular understanding, we were ordered to do so.

Q. Now, was it necessary that the four-wheel trailer be pulled by the 2½-ton truck to perform the mission of the unit? A. It was.

Q. At the time you were issued the new 2½-ton trucks, did they have any conversion units which would permit them being used with the four-wheel trailers so the four-wheel [230] trailers would have brakes? A. They were not available.

Q. When were these—and we will call them conversion units—when were these conversion units made available?

A. I can't answer that because I don't know, but it was quite some time later after we had received the new trucks and had been using them for some time.

Q. Well, sir, to refresh your recollection, I will hand you Department of the Army and Air Force National Guard Bureau bulletin, dated 10 February, 1954, Volume 5, No. 8, and direct your attention to page 5 of that bulletin in Section 5 and it is paragraph 8 in the middle of the page, and ask

(Testimony of General Wilburn H. Stevens.)

you if that refreshes your recollection as to when these conversion units for the new 21½-ton trucks were made available to the National Guard by the United States. Well, it states that:

“The following kits are now available upon requisition at the appropriate distribution depot.”

And goes ahead and lists the kits, the new conversion kits for 21½'s to use with the old trailer.

A. They were, however, the actual receipt of these was some time after, quite some time after the date of this particular directive.

Q. That directive was what again? [231]

A. 10 February, 1954.

Q. Well, now, from the time of your receipt of the new 21½-ton trucks until some time in 1954, did the 21½-ton trucks with the higher voltage operate with the old four-wheel trailers without any brake connection between the two? A. They did.

Q. Was that useage required in order to perform your mission? A. It was.

Q. Would those conversion units come under the classification of automatic type issue?

A. They would.

Q. During——

A. However, excuse me. This says here that they are available upon requisition so I presume that Col. Hagen, the USPFO, did requisition the kits.

Q. But it would be after February, 1954, the date of that directive?

(Testimony of General Wilburn H. Stevens.)

A. Yes, it would be; it would be.

Q. Sir, do you know of your own knowledge whether the United States of America, the regular army, was, during this period, say, from the middle of 1952 until some time in 1954, operating new 2½-ton trucks with the old trailers with no possible brake connections between the two? [232]

A. I am satisfied that there was a period in which they did so although they would receive these kits before the National Guard would, in all probabilities.

Q. Was it required in the performance of your mission that the 2½-ton trucks pull these four-wheel trailers on the public highways of the State of Washington?

A. That is right; there is no other way of transporting a trailer from one place to the other.

Q. And on March 11, 1953, the date of this accident, was it required that the four-wheel trailer be pulled by a new 2½-ton truck? A. It was.

Q. And was it on that date required in order to perform the mission that the old 2½-ton truck be pulled—strike that. Was it required on the date of the accident that the old four-wheel trailer be pulled by the new 2½-ton truck without any brakes between the two?

A. We deemed it so because the training of that unit depended on their having this director.

Q. Wasn't it true there wasn't any other way to pull the trailer? A. None that I know of.

Q. The new trucks were automatic issue to the

(Testimony of General Wilburn H. Stevens.)

unit, were they not? A. They were. [233]

Q. And the trailers were always an automatic issue to the unit, were they not?

A. Yes, we had them for quite some time.

Q. They were part of the Table of Equipment materiel for the unit? A. Right.

Q. Sir, are National Guardsmen under your command covered by the State of Washington Workmen's Compensation Act?

A. Not as National Guardsmen.

Q. Do National Guardsmen take the federal loyalty oath in the same form that the members of the Army of the United States do?

A. They do.

Q. Well, who at Camp Murray is in charge of determining whether equipment being released by Camp Murray to the various units is in safe condition for travel on the highway?

A. Well, I presume it possibly could come all the way back to me, but Col. Hagen, the U. S. P. & F. O., is the man who determines as a rule.

Q. Well, now, prior to March 11th of 1953, had you made attempts to obtain the electrical conversion equipment between the new trucks and the old trailers?

A. That was handled by Col. Hagen and I am certain [234] that he did make every effort to get these and, if my memory serves me, there was considerable arguing back and forth as to what we were to do and finally the decision was that we would have to use the equipment without the kit.

(Testimony of General Wilburn H. Stevens.)

Q. You couldn't perform your mission without using it, wasn't that the reason?

A. That is right.

Q. And you couldn't get it because the army didn't give it to you, isn't that right?

A. That is right.

Q. Sir, on March 11, 1953, who was the employer of Sergeant Brown of Battery C of the 770th?

A. Well, the direct employer was the battery commander, of course, but the authority came all the way down from Secretary of the Army through my headquarters.

Q. And did all the authority relevant to his hiring, firing, working hours, parallel to civilian service benefits, leave and sick leave come down from the Secretary of the Army?

A. It does.

Q. And it did on that date, isn't that true?

A. It did.

Mr. Dovell: I object to that on the ground it is a conclusion and the legal opinion of this [235] witness.

The Court: Well, I think there may well be some merit in that. Those questions involve mixed questions of fact and law. However, I will leave the answer stand for such value as it may have. Of course the opinion of the witness as to a legal matter would not be admissible. On the other hand, the source of authority by which Brown was employed, supervised in his employment, might be considered a question of fact and, therefore, subject of testimony by this witness who is, of course,

(Testimony of General Wilburn H. Stevens.)

highly competent to testify on the subject if it is a subject for testimony. Accordingly, I will allow the answer to stand. Overrule the objection.

Q. Sir, does the State of Washington provide insurance, liability insurance, for vehicles operated by the State of Washington? A. It does.

Q. On March 11, 1953, did the State of Washington provide insurance for, that is, liability insurance, on the 2½-ton truck that was operated by Brown in this accident? A. No.

Q. Sir, handing you Government Exhibit 1—
The Court: A-1.

Q. (Continuing): Sir, handing you Defendant United States of America's Exhibit A-1, being photostatic copies of letter from D. K. MacDonald & Co., insurance brokers, and [236] policies with General Insurance Company of America and with particular reference to page 4 of that exhibit, I will ask you with reference to the National Guard on March 11, 1953, what, if any, vehicles were covered by public liability and property damage insurance by the State of Washington?

A. The vehicles that were purchased from the state funds were covered and certain trucks issued by the United States Government to the National Guard, but which were used for strictly state purposes were covered in that insurance.

Q. Can you describe from that exhibit what those vehicles were and how many of them were what—

The Court: Isn't the amount in the exhibit?

(Testimony of General Wilburn H. Stevens.)

Mr. Casey: Only by number of vehicles, your Honor.

The Court: Go ahead, all right, just——

Mr. Dovell: I am going to object to interpretation of this policy because there is a legal question here of what cars or automobiles are covered by this policy. One contention may be that all property is covered. Another contention may be that just state-owned, but that is an interpretation of the policy and the policy speaks for itself.

The Court: Right at the moment the question that is being presented at this moment is to describe certain [237] vehicles enumerated in the exhibit. I think that is the question.

Mr. Casey: That is the question, your Honor.

The Court: Well, if the witness knows the answer to that he may give it, describe certain vehicles.

A. Five-passenger automobiles or sedans which are used by people who are paid from state funds in their travel throughout the State of Washington in the supervision of the National Guard.

Q. That wouldn't include unit caretakers, would it?

A. No. Six trucks. Now we use certain, the Federal Government allows the state to strictly use certain trucks for the use on the reservation, we will say, and for our big installations like, for instance, one of these trucks is used by our custodian of the armory in Seattle for the purpose of hauling garbage and ashes and such things as that. I can't

(Testimony of General Wilburn H. Stevens.)

tell you exactly what each of these six trucks were. One of them is a panel truck purchased by the state which is used by our maintenance crew. Another truck is a state purchase truck, a dump truck which we use in hauling, filling our various installations in the state. Two others are pick-up trucks purchased by the state. Now we go down to the number it shows, one trailer-type unit, and that is the big trailer, to the best of my knowledge, the big trailer which we use to, for hauling [238] extremely heavy stuff like boilers and very heavy equipment which we have to transport over the roads, for instance, bulldozers. In some cases we would haul even our road grader on them.

Q. Sir, are the trucks listed in there, do they bear Washington State license plates?

A. They do.

Q. All the trucks covered under that policy bear Washington State license plates?

A. They do.

Q. Do any of the trucks and trailers in the units, Battery C, for example, of the 770th, bear Washington State license plates? A. No.

Q. As a matter of fact, one of the vehicles on this, in that list you have there is used by the state painter, isn't it? A. That is right.

The Court: Now, this exhibit has been referred to but not yet admitted in evidence.

Mr. Casey: Well, if your Honor please, I believe that was admitted into evidence as the De-

(Testimony of General Wilburn H. Stevens.)

fendant United States of America Exhibit 1-A in the pretrial order.

The Court: All right, fine; thank you.

Mr. Casey: I have no further questions. [239]

The Court: Cross-examine, Mr. Dovell.

Cross-Examination

By Mr. Dovell:

Q. General, are you a state officer or a federal officer? A. I hold a dual status.

Q. What active status do you hold?

A. I am a federally recognized Brigadier General in——

Q. I mean, in your capacity as adjutant general, are you an officer of the state?

A. I received my appointment from the Governor. I am a regular National Guardsman who have been called to full-time duty by orders of the Governor.

Q. Then you are acting under the Governor of the State of Washington?

A. To a certain extent.

Q. To the extent of your employment?

A. No; I must carry out the orders of the Governor and at the same time the rules and regulations which are handed down to me by the Department of the Army.

Q. In carrying out those rules and regulations handed down by the Department of the Army, are you compelled to carry out those directives or advisory orders?

(Testimony of General Wilburn H. Stevens.)

A. I have some leeway, but in general I must carry [240] them out.

Q. Now, if you did not carry them out, what would happen? Would you be court martialed by the army?

A. No, no; they would withdraw. If I did not carry out the rules and regulations they would take up the matter with the Governor and if it continued they would withdraw the federal recognition of the units of the Washington National Guard.

Q. Isn't that the only penalty that would be suffered if orders or directives or suggestions from the Department of the Army were not carried out?

Mr. Casey: I object to the use of the term "suggestions," if your Honor please.

Mr. Dovell: The counsel have used the word "directive" and I have to do something to offset the argument that the General here is acting directly as a commanding general for the army.

The Court: Yes. Well, repeat the question. I think it may be answered. General Stevens is an alert witness and I am sure he will follow closely the question put.

(Whereupon, the question was repeated.)

The Court: You may answer.

A. The Department of the Army could ask the Governor for my dismissal. [241]

Q. But the Governor would decide upon that?

A. The Governor would make the decision.

Q. That is within the state authority?

(Testimony of General Wilburn H. Stevens.)

A. That is right.

Q. Otherwise if the Governor didn't, why, the penalty that might be suffered would be that the Guard would not be recognized further than as a State Guard?

A. That is right; they would withdraw, they could withdraw my federal recognition, also. They could withdraw the money and equipment from the State of Washington.

Q. You recall, General, that during the war there was a number of us that served in the State Guard without federal recognition?

A. Yes, sir.

Q. And that was in lieu of the Guard that already had been called into service?

A. Yes, sir.

The Court: Into federal service, you mean?

Mr. Dovell: Yes, in federal service.

Q. In regard to this equipment that is furnished automatically or otherwise by the army, that also comes by way of aiding in the training of the units of the Guard?

A. Under the law the army prescribes the training for the National Guard and the equipment.

Q. When you say under the law, you mean that the army [242] sets up standards?

A. That is right, sir.

Q. For them to qualify as to whether they'd be federally recognized?

A. That is right, and whether they retain federal recognition.

(Testimony of General Wilburn H. Stevens.)

Q. And if they do not comply with those standards, then they lost that federal recognition?

A. Yes, sir.

Q. Is that correct? But they do not and they are not compelled by any law under the sun to obtain federal recognition?

A. Well, the National Guard is now listed as the first line of defense and as such they are given very definite responsibilities. All of my troops in the Washington National Guard have already been assigned many day missions and the orders are written and everything exactly what they do. There is an agreement between the state and the federal government in regards to National Guard.

Q. But at the same time there is no order that compels the State Guard to be federally recognized or get out of existence?

The Court: We know that to be a fact and whether the witness says so or not, is that not so? I mean, it is [243] a matter of law, isn't it?

Mr. Dovell: True, it is a matter of law.

Mr. Casey: Yes.

Q. (Continuing): So that when equipment comes to you or to the Guard and whether you use it or not is a matter in your hands?

A. We have to use it or go out of business.

The Court: Go out of business to the extent of not getting federal recognition, isn't that what you mean, General?

The Witness: That is right, or federal money.

The Court: Yes, but there wouldn't be anything

(Testimony of General Wilburn H. Stevens.)

to prevent some state if it desired to equip its National Guardsmen with muskets or flintlocks or any other thing if it saw fit? The state could do that if they saw fit to do it, couldn't they?

The Witness: Yes, sir, we have a hundred million dollars worth of equipment at the present time.

The Court: The point of the thing being that in order to procure federal aid through recognition certain standards of training, use of equipment and so on must be complied with?

The Witness: Yes, sir, that is correct.

The Court: But if some particular state, Texas, for example, decided that it didn't want to go along with [244] that program, it could do so, couldn't it?

The Witness: Yes, sir, Texas is the logical state, sir.

The Court: It is a very good choice of an example, I thought.

Q. So, after all, it is the idea of being supplied federal funds that is persuasive to the fact that if you want to continue to be financed you have to gain the recognition of the federal authorities?

A. That is correct.

Q. And it is the same way with the caretaker, the caretaker of the state property or the Guard property, you have to have a caretaker, otherwise you do not get federal recognition?

A. Well, the Federal Government is concerned about its equipment. It wants some one to look after it. I presume whether it was in the hands of the National Guard or where it was, that someone

(Testimony of General Wilburn H. Stevens.)

would be caretaker looking after it and paid from federal funds.

Q. They want that office designated for the purpose of looking after it in the way of mechanical repair and the other duties assigned to that position, is that correct?

A. The caretaker does only minor mechanical repairs. He does, as I said before, what we term first echelon maintenance, about what the average owner does for his own [245] car. He keeps an eye on the water and the radiator and battery and tires and that sort of thing and sees that it is not abused. A great deal more of his time is spent on taking care of rifles, machine guns, blankets, canteens and all of the items of equipment. Then comes the paper work which requires practically half of his time.

Q. That paper work is papers in connection with the Guard? A. Yes.

Mr. Dovell: I think that is all.

The Court: Well, of course, as far as the requirement of having a unit caretaker is concerned, there is really not any distinction between the requirement of having other personnel required by the Table of Organization in order to qualify for federal recognition, is there, General?

The Witness: No, sir.

The Court: In other words, the unit caretaker is one of a considerable number of persons serving in various capacities that the National Guard unit must have in order to qualify for the federal rec-

(Testimony of General Wilburn H. Stevens.)

ognition and the federal funds and supplies and money and so on?

The Witness: Yes, sir.

The Court: So that his status as an employee of the State is no different than that of any other one of the considerable number of persons required to serve in a National [246] Guard Unit if it is going to conform to the standards required for federal recognition, is there?

The Witness: He has to be a member of the National Guard in order to be a unit caretaker.

The Court: There is no distinction in his status though as far as employment is concerned than any other of the persons required by the National Guard unit, is there?

The Witness: No, sir, I wouldn't say so.

The Court: That is all. Do you have anything?

Mr. Rupp: I have no questions.

The Court: Very well.

Mr. Casey: I——

The Court: Did you have something?

Mr. Casey: I have several.

Redirect Examination

By Mr. Casey:

Q. From whom, General, do you obtain your authority to hire the sixty-five or so civilian employees of the National Guard to which you made reference in your earlier testimony?

A. From the Governor of the state.

(Testimony of General Wilburn H. Stevens.)

Q. From whom is your authority derived in the hiring of unit caretakers? [247]

A. Well, it would come from the Secretary of the Army down through the National Guard Bureau to us.

Q. And that is in accordance with the regulations that have been referred to during the course of your testimony, is that right?

A. Right. [248]

* * *

LT. COL. ALBERT G. HAGEN

having been previously sworn on oath, was recalled as a witness on behalf of the Plaintiffs and testified as follows:

Direct Examination

(Continued)

By Mr. Casey:

Q. Will you state your full name, please?

A. Albert G. Hagen.

Q. What is your address, sir?

A. Business or residential?

Q. Your business address.

A. Camp Murray, Fort Lewis, Washington.

Q. Are you a member of the Army of the United States, sir? A. Yes, sir.

Q. Where are you detailed to duty?

A. Camp Murray, Fort Lewis, Washington.

Q. What is your rank? A. Colonel.

Q. What is your army serial number?

(Testimony of Lt. Col. Albert G. Hagen.)

A. 0910503.

Q. What is your branch of service?

A. Ordnance Corps.

Q. What insignia are you presently wearing?

A. Insignia of the National Guard Bureau. [466]

Q. What is the significance of that fact?

A. Well, I am detailed to duty to the Special Staff of the United States with duty with the National Guard Bureau which is a Special Staff Section of the Department of the Army.

Q. National Guard Bureau being in Washington? A. Washington, D. C., that is correct.

Q. If you were on duty as a colonel in the National Guard of the State of Washington, what insignia would you now be wearing?

A. I'd be wearing insignia of the Ordnance Corps.

The Court: When you are on active service in the Army of the United States and assigned to this particular duty?

The Witness: That is correct.

The Court: Yes.

Q. What are your present duties?

A. My present duties are, title is United States Property and Fiscal Officer. Those duties include, number 1, an accountable officer for all property issued to the Washington National Guard, federal property, that is. I handle all the supply functions. I account for and handle all fiscal matter, payrolls, purchasing and contracting. I am purchasing and

(Testimony of Lt. Col. Albert G. Hagen.)

contracting officer. I am a transportation [467] officer.

Q. Are you also in charge of the, what used to be known as the unit caretakers and what is now called the administrative, supply and maintenance technicians?

A. I have the funds for them and I pay them. I certify their payrolls for payment by the Finance Office. They are hired and fired by the discretion of the Adjutant General. However, the funds for their payment is administered by me.

Q. While hiring and firing is in accordance with a federal law the Secretary of the Army delegates that function to the Adjutant General, isn't that correct?

A. That is my interpretation, yes, sir.

Q. Well, what contact do you have—strike that. Is the position that you now hold, was that formerly known as the United States Property and Disbursing Officer? A. That is correct.

Q. Commonly known as U. S. P. & D. O.?

A. To clarify that position, prior to July of 1954 it was known as the Acting United States Property and Disbursing Officer and by a law passed in 1954 it is known now as United States Property and Fiscal Officer. They have removed the "Acting" and substituted the word "Fiscal."

Q. What were your duties and position on March 11, 1953, sir?

A. I was then the Acting United States [468] Property and Disbursing Officer.

(Testimony of Lt. Col. Albert G. Hagen.)

Q. What was the procedure by which materiel was placed in the hands of batteries and battalions of the National Guard at that time?

A. The procedure would be that equipment was authorized them by the appropriate T. O. & E. When it became available to the State of Washington through being shipped to my property account, well, then, the unit for which this equipment was designated would be so advised and be ordered to come in and pick it up upon submission of the proper documents. In other words, initial slip.

Q. Who makes up the T. O. & E. for a National Guard unit?

A. T. O. & E. is based on the regular Army T. O. & E.'s.

Q. Made up by the Department of the Army?

A. That is right, the National Guard operates under the T. O. & E. of the regular army with reduction factor applied.

Q. Who designates who gets the particular equipment that comes down, federal equipment that comes through your hands?

A. I'd like to ask for a little clarification on that, Mr. Casey.

Q. Well, in your previous answer you indicated somewhat to the effect that property came down designated for a unit, I assume a battery or a battalion. Who made that designation? [469]

A. Well, the T. O. & E. would designate that. In other words, some equipment is found in all T. O. & E.'s and other equipment is only found in

(Testimony of Lt. Col. Albert G. Hagen.)

specific T. O. & E.'s, and based on the fact that is how a unit would be assigned certain equipment. They must be authorized it to be assigned it.

Q. Well, the unit is authorized certain equipment by the T. O. & E.? A. That is correct.

Q. The T. O. & E. is prepared by the Department of the Army? A. That is right.

Q. And the Department of the Army sends equipment to you for use by this particular unit?

A. I might amplify this a little bit. We have as an example, we might have a thousand pieces of equipment of a specific type issued or authorized in the state based on these T. O. & E.'s and we may only get fifty per cent of that. Then we will apply at discretion, at our discretion on the state level as to where this fifty per cent will go. In other words, we may not retain a straight fifty per cent factor through all units. However, it is very rarely that we would get the full authorization of equipment that is authorized by the total number of T. O. & E.'s in the state.

Q. As of March, 1953, what were the basic duties of the administrative, supply and maintenance technician? [470]

A. Well, the basic duties of those personnel were number 1, the accounting for, caring of, receipt of, maintenance of, equipment issued to his unit or organization and administrative duties pertinent thereto.

Q. What was meant by the term "receipt of equipment"?

(Testimony of Lt. Col. Albert G. Hagen.)

A. Well, my interpretation of receipt of equipment——

Mr. Dovell: I am going to object to this answer, your Honor, and question because it calls for a conclusion of the witness and the regulations have to speak for themselves. The interpretation or construction by any member would not be binding on the government.

The Court: Well, I think that is probably true in a certain sense. On the other hand, the practice that is followed with respect of issuing equipment and so on certainly that would be admissible, and another point about this is that I think we have covered this about three times now from three different witnesses that have covered the same point. I think so.

Mr. Casey: Well, your Honor is probably right and I am aware of it. My only feeling was that we are in sort of a never, never, inbetween ground here with General Stevens as——

The Court: The thing about it is it seems to me if you could ask Col. Hagen what the practice is that they follow [471] with respect of issuing equipment, why that would be admissible in any case. Let's do it that way without asking him to give any interpretation of a regulation.

Mr. Casey: Of course the point I am trying to get at is not a question of custom within this particular state National Guard but the, whether this is considered by this officer who is a representative of the United States of America as part of the basic duty of a unit caretaker as opposed to what

(Testimony of Lt. Col. Albert G. Hagen.)

might be some additional duty that could be given him by the state National Guard.

The Court: Well, I want to make a full record on it and I don't want to preclude you, so if there is any conceivable phase of it that hasn't been covered, why go ahead and I will overrule the objection. We will hear it so we will have the full matter before us.

Mr. Casey: This comes from a United States Army officer whereas the other men were National Guard officers.

The Court: I recognize there is that distinction about it, go ahead.

A. (Continuing): Would you repeat the question?

The Court: The question was, what is this term "receipt" as used in, designating the duties of the unit materiel officer, what does that mean?

A. (Continuing): Equipment is receipted for at Camp Murray by the unit caretaker or the company commander [472] or his designated representative.

Q. Is the unit caretaker the designated representative?

A. In practically ninety-nine per cent of the cases, yes, sir. In other words, these representatives for property responsibility who are delegated by us have a signature card which we have on file and only those persons are allowed to sign for property.

Q. Do you consider the picking up of equipment at Camp Murray by the caretaker part of his basic primary duties?

A. I do, sir.

(Testimony of Lt. Col. Albert G. Hagen.)

Q. Do the unit caretakers ordinarily come to Camp Murray in a group?

A. That is the practice that is followed in cases where issues of large amounts of equipment at one time are contemplated.

Q. As a matter of fact, isn't the equipment going down to the battalion for use in the batteries?

A. Equipment is not issued on a battalion basis. It is issued to the companies or batteries individually. However, it is used for the battalion's training.

Q. And the caretakers of the battalion work together in getting that equipment down to the units, the companies and the battalions?

A. That is the common practice, yes, sir. [473]

Q. Well, now, sir, with reference to the old 2½-ton trucks and the new 2½-ton trucks, do you have a—was there a directive requiring the turn-in of the old voltage 2½-ton trucks?

A. There was a letter, I don't recall the exact date, but it was in 1952 directing the turn-in of what was known as World War II type vehicles of which was included the old type 2½-ton truck.

Q. Handing you Plaintiffs' Exhibit 24, will you state whether that is the directive?

A. Yes, sir, that is.

Q. And did that, and did you turn in or did the National Guard return the 259 I believe it is listed, on their old type 2½-ton trucks in accordance with that directive?

A. They did.

(Testimony of Lt. Col. Albert G. Hagen.)

Q. Were they required to do so in accordance with the terms of that directive?

A. Yes, sir, we were ordered they would be turned in no later than 31 July, 1952, which was done.

Q. There is reference on page 2 of that directive towards the end of it a turn-in of some additional equipment, I believe, and I think it talks about some conversion units. Will you explain what that was, what it means?

A. It doesn't mention the word "conversion." I [474] might read it. It is just a short paragraph and explain it, the paragraph 6. "Spare parts, tools, accessories, 12-volt modification kits, OVM equipment and winterization kits will be returned to the Ordnance Distribution Depot serving your state in accordance with 1-C above." I assume your question is with respect of 12-volt modification kit?

Q. It is.

A. The 12-volt modification kits did not apply to 2½-ton trucks. This letter applies to ¼-ton and ¾-ton trucks as well and certain of the ¼- and ¾-ton trucks did have a 12-volt modification kit applied for use with special purchase type signal equipment and radios.

Q. So that particular paragraph is not concerned with——

A. No basis, not as far as the 12-volt modification kits are concerned, no, sir.

Q. Now, we have gone over this before so I will be very brief with it, but what was the voltage in

(Testimony of Lt. Col. Albert G. Hagen.)

the old 21½'s? A. Six volt.

Q. Were new 21½-ton trucks subsequently issued by the Department of the Army?

A. Yes.

Q. When did that issue start coming in?

A. They started to come in in the fall of 1952, the [475] exact date, I cannot remember.

Q. What was their voltage?

A. They were 24 volts.

Q. Now we have had talk about these new 21½'s being 12 volts and I think possibly there is a little bit of misunderstanding in all our minds about it. I wonder if you could clear that up for us?

A. I think the misunderstanding is due to the fact that they have two 12-volt batteries but operate on a 24-volt system.

Q. So that the two 12-volt batteries are connected in series, would you call that?

A. That is correct.

Q. And under the old, the old 21½'s with the four-wheel trailers, were those connected by an electrical brake connection?

A. Those 21½-ton trucks which were used had two. Any equipment which had was equipped with electrical brakes had a 6-volt electric brake system.

Q. And the four-wheel trailer likewise had a 6-volt brake system? A. That is correct.

Q. Well, now, did you turn in or were you required to turn in the four-wheel trailers that had the 6-volt electrical systems [476]

A. No, sir; those vehicles are still the authorized

(Testimony of Lt. Col. Albert G. Hagen.)

vehicle for that particular purpose and use by the army.

Q. And were you on March 11th required to use those four-wheel, 6-volt trailers? A. Yes, sir.

Q. After issuance of the new trucks, were you required to pull the four-wheel 6-volt trailers with the 24-volt 2½-ton trucks?

A. If they were to be moved, they had to be towed by a 24-volt vehicle.

Q. And was it necessary in performance and mission of the National Guard that the four-wheel 6-volt trailers be moved? A. Yes, sir.

Q. Referring to Battery C of the 770th, was it necessary on March 11, 1953, that that—or strike that. Referring to the 770th Battalion, was it necessary that the four-wheel 6-volt trailer be pulled by a 2½-ton truck that was of 24 voltage?

A. Yes, it was in this respect, that if the state status of training require that they have that equipment at their home station it would have to be towed by that type of equipment.

Q. Well, did the status of training require that that four-wheel trailer with its equipment and the 2½-ton truck [477] be in the 770th Battalion?

A. That is a question that I am not qualified to answer.

Q. Did you know on March 11th, before this accident, 1953, and prior to that, that there was no brake connection between the four-wheel trailers and the 24-volt 2½-ton trucks? A. Yes, sir.

Q. Did you believe it was necessary for the

(Testimony of Lt. Col. Albert G. Hagen.)

performance of the National Guard's mission to have those units, the trailer and the new truck, hooked up together and being pulled down the highway?

A. It was necessary to fulfill their training mission, in my opinion.

Q. You say you started to get these 24-volt 2½-ton trucks in in the fall of 1953, is that right?

A. Fall of 1952.

Q. Excuse me, fall of 1952. Did you know as you were receiving these new 2½'s that they had no means of being hooked to these trailers for brakes?

A. Yes, sir.

Q. Did you do anything about it?

A. Yes, sir.

Q. What did you do?

A. We attempted to find out an available conversion [478] kit or parts that could be used to, that would be available by the Chief of Ordnance who was the designer and supplier of the vehicles.

Q. Chief of Ordnance, that is the United States Government?

A. That is correct; to determine if any such kits were available and we were informed that they were not available and we could not procure them at that time.

Q. Did you receive any such order in writing?

A. We subsequently received such an order from the National Guard Bureau.

Q. Do you have that order with you?

A. I do.

(Testimony of Lt. Col. Albert G. Hagen.)

Q. Will you produce it, please?

A. This is——

Q. I think we will mark it and then you can read it, sir. It might be easier to follow.

A. I will have to have that copy back but I think there has been an extract made.

Q. Well, if there has—— A. I am sure.

The Court: You can substitute a photostat at a later time, go ahead.

The Clerk: Plaintiffs' Exhibit 36 has been marked for identification. [479]

(Plaintiffs' Exhibit 36 marked for identification.)

Q. Sir, handing you what has been marked Plaintiffs' Exhibit 36 for identification, will you state what it is and advise us?

A. The Army Division Logistics Letter issued by the Department of the Army and the Air Force National Guard Bureau under date of 31 January, 1953.

Q. Is that an order that is made out by that Bureau and forwarded down to your level?

A. Well, I might read the first paragraph, certain portion of this which may answer your question:

“Army Division Logistics Letters will contain only items of an informative or interim nature which will in many cases be published at later dates in permanent publications such as regulations, modification work orders, etc.”

(Testimony of Lt. Col. Albert G. Hagen.)

Does that answer your question?

Q. Yes, it does.

Mr. Casey: We will offer Plaintiffs' 36 in evidence.

The Court: Any objection?

Mr. Dovell: I object to it because I don't think it is relevant, your Honor.

The Court: Well, can't tell that until I see the [480] content of it and what the Colonel refers to——

Mr. Casey: I will ask him.

The Court: Are there any other objections other than its relevancy?

Mr. Dovell: I haven't read it. Just what he read was all that I could go by.

The Court: Take a look at it.

The Witness: I only read one section of it, sir.

The Court: Let the Colonel refer to the part that is pertinent and then we will pass on the motion to strike it.

Mr. Casey: Fine, sir.

The Court: That will be quicker. In a non-jury trial the Court undoubtedly will hear a lot of things he has to exclude at a later time.

Q. Will you refer to the pertinent part, Plaintiffs' Exhibit 36 for identification, and tell us what it says?

A. Section 2, under Maintenance, paragraph 1:

“Conversion kits, twenty-four, six-volt, will not be requisitioned by the states until further notice. The Bureau will furnish full information for the

(Testimony of Lt. Col. Albert G. Hagen.)

requisitioning of the above kits when notified by ordnance that these kits are available for issue from depot stocks.”

That is all that is pertinent. [481]

The Court: Now——

Mr. Dovell: I think that is in the stipulation, your Honor.

The Court: It may be, but is there any further occasion to object?

Mr. Dovell: If that is all that is requested to be admitted, I admit that.

The Court: Very well, the exhibit is admitted and you can withdraw the original, Colonel, and provide for a photostat of it or some other form of a copy that is agreeable to counsel.

Mr. Casey: Yes, sir.

(Plaintiffs' Exhibit 36 admitted in evidence.)

Q. Now, in that reference to which you have just read, what is meant by the 6 volt, what are they talking about?

A. Well, it referred to a conversion kit, 24 to 6 volt, which means a kit whereby the voltage from a 24-volt vehicle can be converted to 6 volts that can be applied to the braking system of the towed vehicle.

Q. In other words, if that particular kit were used on the 2½-ton truck that was involved in this accident and the four-wheel trailer that was involved in this accident, does that mean that the trailer would have been [482] equipped with brakes

(Testimony of Lt. Col. Albert G. Hagen.)

that could have been operated from the cab of the truck?

A. That is correct.

Q. What was the date again of that order?

A. It was 31 January, 1953.

Q. Prior to that time had you attempted to get in such conversion equipment from the United States Government through their Ordnance Depot at the so-called Rainier Ordnance Depot of the Government?

A. That was one of our channels. We had contacted the National Guard Bureau also and every place we contacted and asked other departments of the army agencies about the availability and we met with negative results everywhere.

Q. Do you know of your own knowledge whether the Inspector General's Department of the Army of the United States was familiar with the functions of the caretakers in this state insofar as their picking up and receipting for equipment at Camp Murray?

A. I am sure they are familiar with that procedure.

Q. I believe that regulations provide that the Inspector General's Department after inspecting the National Guard will consult with you with reference to irregularities?

A. That is correct.

Q. Has the General Inspector's Office ever advised you of any irregularities in connection with the duties of [483] the caretakers insofar as this thing, I should qualify, insofar as picking up equipment at Camp Murray is concerned?

(Testimony of Lt. Col. Albert G. Hagen.)

A. No, sir.

Q. Do you know of your own knowledge whether prior to March 11, 1953, the United States Army was operating equipment, new 2½-ton trucks with 24-volt systems pulling four-wheel trailers with 6-volt systems?

A. I can only assume that they were because there was no equipment available to convert.

Q. Was it possible on March 11, 1953, to pull these four-wheel trailers with anything smaller than a 2½-ton truck?

A. Not this type of trailer, no, sir. The trailer is too heavy to be towed by anything smaller available to the National Guard.

Q. When did you finally get these conversion units from 24 to 6?

A. First availability on these conversion units, we were informed of the availability on 10 February, 1954.

Mr. Casey: I have no further questions.

The Court: Cross-examine?

Cross-Examination

By Mr. Dovell:

Q. Colonel, would you explain in what capacity you [484] act in connection with National Guard with the Adjutant General?

A. Well, I am detailed to duty as I previously outlined as the Property and Fiscal Officer. I have an additional responsibility of acting as his advisor

(Testimony of Lt. Col. Albert G. Hagen.)

in logistical matters and as a staff officer on his staff. Does that answer your question, sir?

Q. Well, in that connection who would be responsible for placing materiel on the Washington highway?

A. Well, I'd like a little clarification of the question, Mr. Dovell.

Q. I think that yesterday the General said that you were responsible for placing trailers and trucks on the highway for the National Guard. I didn't understand that you were running the National Guard, so I am asking you.

A. Any order that is issued out of my office to any National Guard personnel is issued in the name of the Adjutant General.

Q. If the Adjutant General didn't care to observe what suggestion or direction you requested would he have to do so?

A. No, he can overrule me with very little trouble.

Q. That would involve in his being responsible for his own job? [485]

A. I would say so, yes.

Q. In other words the responsibility is his of running the Guard, placing the equipment on the highway?

A. Well, it is my understanding that anything in connection with the operation of the Guard in the State of Washington is the responsibility of the Adjutant General as far as the operation of the National Guard is concerned.

(Testimony of Lt. Col. Albert G. Hagen.)

Q. And what is his capacity as you understand?

A. My understanding is that he is an appointed state official on the state status.

Mr. Dovell: That is all.

Cross-Examination

By Mr. Rupp:

Q. Colonel, we have been hearing a good deal about 2½-ton trucks and 24-volt electrical systems and four-wheel trailers and 6-volt electrical systems. The fact that they wouldn't be hitched, that the braking systems couldn't be hitched up, didn't you think that was dangerous?

A. You are asking for a personal opinion now?

Q. Sure.

A. My personal opinion under normal operating conditions, normal precautions, I don't believe so.

Q. That is why they were permitted, is that right? [486]

A. I refuse to answer that question.

Q. You don't know?

A. No, I don't know if that is why they were permitted, but I personally don't think it was dangerous because it had been done so much before and no undue——

Mr. Casey: I will object to what may have happened.

The Court: Well, it is late in the game now. We have gotten a long ways into matters of opinion that weren't probably proper to begin with. I

(Testimony of Lt. Col. Albert G. Hagen.)

think this subject has been fully covered, though, hasn't it?

Mr. Rupp: Yes, that is all I have.

Mr. Dovell: Just one other question.

Further Cross-Examination

By Mr. Dovell:

Q. Colonel, could these conversion kits have been obtained by the Guard from other sources than the Army? A. By that do you mean——

Q. I mean is there similarity in construction of trucks and trailers so that, from private companies, that such could have been obtained by the Guard without waiting for it from the Army?

A. I can answer it in this fashion, that the United States Army or the Government, I will put it that way, to [487] my knowledge is the only persons operating 24-volt vehicles with 24-volt electrical systems. That is a specific specification for military vehicles, tactical military vehicles, and I don't think that we, in fact I am quite positive, that we could not get any 24-volt equipment other than through the Army and I may further, to answer your question, we have no means of obtaining any equipment for the National Guard for the federally furnished equipment other than through federal supply channels. Now when I say federal supply channels, either by requisitioning or using federal funds to buy such equipment.

Q. If such was obtainable could you requisition

(Testimony of Lt. Col. Albert G. Hagen.)

funds? A. Probably, if such was obtainable.

Mr. Casey: I will submit that is hypothetical inasmuch as——

The Court: Of course it is very speculative unless something has been done of that character before, something of the kind; if you are just going to guess about it you had better not do that.

A. (Continuing): ——I am not going to guess because—I will answer it as——

Mr. Dovell: I will withdraw it.

The Court: Anything further?

Mr. Casey: Nothing further, your Honor. [488]

* * *

COLLOQUY ON ADMISSION OF EXHIBITS

Mr. Dovell: Rested provided I would like the understanding as to the exhibits that have been offered that the—I gathered the Court admitted the Government's exhibits?

The Court: All of the Defendant's Exhibits, A-1 to A-6, inclusive, have already been admitted during the course of the plaintiff's evidence.

Mr. Casey: No, your Honor, may I——

The Court: Is that not correct?

Mr. Casey: My understanding, your Honor, is that A-1, -2, -3 and -4 have been admitted, that in A-1 there was a part we were to delete. That has been delated, but that -5 and -6 have not been offered by the plaintiff.

The Court: Oh, very well. I have my notes and

they indicate the contrary, but I must be in error. What do your notes indicate?

The Clerk: A-1 to A-4, your Honor, has been admitted.

The Court: I am sorry, I make notes of those things and I misnoted, I guess. You then want to offer A-5 and -6?

Mr. Dovell: I will offer them, your Honor, and let the plaintiff's counsel raise his objections.

The Court: Yes, go ahead. [491]

Mr. Casey: If your Honor please, A-5 and A-6 as marked as Government's exhibits are, well, A-5 first, is an annual report of the Chief of the National Guard Bureau for the fiscal year ending 30 June, 1949, which I feel has no relevancy. It is not an order, Army directive or otherwise, but is merely, as I understand it, a report of what his National Guard is doing. And A-6 is the same thing for the fiscal year ending June 30, 1951.

The Court: What is the purpose of these exhibits?

Mr. Dovell: The main purpose is, your Honor, they were forwarded to me by the Department as exhibits and I——

The Court: That is not a very——

Mr. Dovell: I am offering them in deference——

The Court: Not very good——

Mr. Dovell: Superior opinions.

The Court: Not a very good ground for admitting them. I am going to refuse them. However, they will be marked and identified and in the record if by some miracle that is pertinent to the matter

it will be in the record for anyone who is interested to find and refer to, but A-5 and A-6, the objection to their admission is sustained.

(Defendant U. S. Government's Exhibits A-5 and A-6 rejected.)

Anything further from the United States?

Mr. Dovell: I believe that is all, your [492] Honor.

* * *

COURT'S ORAL REMARKS

(Designated Portion)

Now on the fact side of the Government's, as to the Government, there really isn't any fact issue of any consequence as far as the issuance of the truck and Brown's status and his getting the truck and while getting it following his duties as a unit caretaker—I am going to use that term rather than the longer later title and also because it is used in some of these cases. It is perfectly clear that a truck and trailer combination outfit weighing very great weights, I think the trailer was four ton without a load, wasn't it, something of the kind?

Mr. Casey: (Nods head.)

The Court: Very heavy piece of equipment being [549] hauled by this truck without brakes. Now even if there weren't a statute of the State of Washington requiring, making that unlawful, I think it would be difficult to escape a finding that it constituted negligence even in the absence of a statute. But be that as it may, the fact is that there

is a state and local, that is an ordinance of Tacoma making that kind, the operation of that kind of a combination of vehicles on the public highway unlawful and, of course, Hornbrook law that violation of such a statute is negligence per se.

Now the question is, how did it come about? Apparently it was not an accident or an inadvertence or overlooked. Col. Hagen said that the matter had been the subject of correspondence and of requests and what not for a long time. It had been pointedly called to the attention of the authorities that these National Guard units called for equipment that involved this kind of a dangerous and negligent and unlawful combination of vehicles on the highway. It is difficult for me to know from the evidence before me whose fault that was. In all likelihood it is one of those things that happen in governmental affairs when multiple governmental agencies are dealing with the same subject matter, they very frequently overlook the most obvious things and all ten of them work on the same problem. That is not uncommon. In all likelihood [550] it is just one of these things that happen that way.

Now the question is though, is there anywhere along the line that according to the evidence that I have before me where we can see negligence in permitting the vehicle to be on the highway at all? I think you may be under a misapprehension from the briefs that were given me as to the provisions of the Federal Tort Claims Act generally referred to as the Tort Liability Act, so I went back to the original act as it was originally enacted and it is

found in 60 Statutes at Large, page 842, and following. Now the pertinent part as far as we are concerned, reads as follows: "Subject of the provisions of this title the United States District Court of the district where the person injured or the accident occurred," I am paraphrasing there, "shall have exclusive jurisdiction to hear and determine and render judgment on any claim against the United States for money only accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligence or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury or death in accordance with the law of the place where the act or [551] commission occurred. Subject to provisions of this title the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances except that the United States shall not be liable for interest prior to the judgment, or for impunitive damages."

Now when they codified this they got the hind end to and the latter portion of this is now Section 276 and the prior part is a later section. So when you read it in the USCA it gives you an entirely different meaning if you read it in that order. You must read it in this order to understand what it means.

Now this has been commented upon by the United States Supreme Court in *Dalehite vs. U. S.*, 346 U. S. I think it starts at page 15, but particularly at page 40 where the Court—that, by the way, is the Texas City disaster cases. You have probably had some previous acquaintance with it, the terrible disaster when the ships blew up in the harbor down at Texas City and so on. Now this *Dalehite* case at that place points out that the statute requires a negligent act and it must be of an employee, and this *Dalehite* case points out that the mere fact that the Government may be operating an inherently dangerous commodity or engaging in an extra hazardous activity and so on, does not afford a basis of liability. So we have got to find an [552] individual employee of the Government negligent in order to permit the Court, in order to establish jurisdiction in the Court.

Now query: Is there an individual employee of the Government that can be chargeable with negligence in permitting this truck without brakes to, this trailer, I should say, without brakes, this combination of vehicles, to be on the highway in violation of state law?

Well, somebody in the army or the Department of the Army, as it is now called, I believe, authorized the issuance of this equipment, somebody wrote the directives, somebody issued the regulation and whoever that somebody was obviously was an employee of the Government and obviously was acting within the scope of his employment by the very nature

of the directive and regulation that was issued, at least I have got to assume that he had the authority to issue the regulations, they being full and fair upon their face.

I have grave doubts whether I can fasten liability on the United States on account of the doings of that somebody although I am firmly convinced that somebody erred, somebody was negligent in authorizing and permitting enormous vehicles of this kind to be issued and released upon the unsuspecting public.

Well, then, we get down to the next level below that [553] to the officer who released it, Col. Hagen. Of course, he is an army officer acting pursuant to orders. Query: Can an army officer who realizes that equipment is dangerous, who is presumed to know it is in violation of state law, who, pursuant to orders, releases equipment, can he be charged with negligence? Of course he wouldn't have any criminal liability under this Act because it would be absent. The fact he was acting under orders would eliminate intent so he wouldn't have any criminal liability under the Washington Act for having allowed the vehicle. But, of course, intent is not an element of negligence. A person can be grossly negligent and from the very best of intent and motives and often is. It is a serious question whether Col. Hagen who admittedly was acting as an employee of the Government in doing what he was done can be charged with negligence. And then we get down to the matter of Brown. What I have just said concerning the actions of Col. Hagen with respect to

releasing the vehicle would be applicable to Brown and his superiors insofar as their drawing them is concerned. They were acting under orders. Query: Can you act strictly in accordance with orders in a matter of this kind and yet be chargeable with negligence? The statute says anyone who operates a vehicle on the highway without these brakes is violating the law, that is, the Washington State statute so provides, and it is Hornbook law that a violation of state statute is [554] negligence per se. It isn't a question of intent. If Brown had been picked up and charged with having violated this Act, he undoubtedly could have successfully pleaded he was only doing what he was ordered to do. I don't know whether some Justice of the Peace would have accepted that defense, but ultimately somebody would have, I am sure. But the fact of his intent wouldn't be an important factor in the matter of whether or not he was negligent. I think in view of the fact that he was violating the law of the State of Washington in operating that vehicle without brakes, the kind of brakes required, that he was negligent ipso facto in driving the vehicle on the highway and there isn't any question, of course, about the casual relationship between the brakes, the lack of brakes and the happening of the accident.

Now we get down to the last and immediate question: Was Brown negligent in the handling of the equipment immediately prior to and at the time of the accident? He says he knew he had no brakes on the back end of that rig, fully familiar with its

weight, size, the difficulty of handling it. He knew he was traveling on a wet pavement and he was traveling on a street, heavily traveled street. It doesn't clearly appear here but there is some inference that Brown must have passed this very place on his way to the Camp Murray that morning and if so he must have had [555] actual constructive knowledge of the fact that the Telephone outfits were on the street. I don't think I'd have the right to charge him with that under the state of the evidence, but there is some inference to that effect. In any event, he is coming down there with a behemoth behind him that he knows he is going to have a tremendous problem of handling if he is faced with an emergency.

Now the Washington State law very emphatically charges every driver of a motor vehicle with the duty of anticipating the necessity of emergency stops. That is the law in the State of Washington. I could give you some cases just almost from memory. In other words, Brown was charged with the knowledge that somebody might be making repairs in the street, that somebody might be stalled, that the traffic light might change, that a pedestrian might come out. Keep in mind this was a pedestrian crossing and there was a big sign across the street indicating a pedestrian crossing right at this point which he could have seen for hundreds of feet back. Supposing somebody walked out across that street at that point as they had a perfect right to do in that pedestrian walk and under Washington law the driver would have been bound to yield the right-

of-way. Was he driving along there in a manner so as to enable him to keep this vehicle under control considering the condition it was in? I just am [556] bound to say that he was not, that if this outfit was as uncontrollable as he knew it to be and as subsequent events proved it to be, keeping in mind all in violation of law which he is presumed to know, then he was bound to proceed at such a rate of speed as he could control the vehicle and if that got down to two miles an hour or three miles an hour or five or whatever it was, that was his duty to travel at such a speed as he could keep this thing under control or reasonably could do so. And he didn't do that. I don't want to be harsh on Brown, probably a human being, maybe any of the rest of you would have done the same thing, but it still would have been negligence considering the enormous hazard to life and limb that was involved in it. So I am disposed to find Brown negligent in driving the truck on the highway in violation of state law and in particular in driving at the speed and in the manner that he had immediately prior to and at the time of the accident. There is no question, of course, but what his negligence was a direct moving proximate cause of the accident. I neglected to say that with respect to the Telephone Co. I am of the impression that even if you believe they were negligent in not having the signs further down or not having a flagman or not having cones or not having something else, that, I think, at most it would have been a condition and not a moving [557] cause. The moving cause of this accident was the

gross and inexcusable negligence of the Government's employees in operating a dangerous rig of this kind on the highways in violation of the state law. Whatever our views of state rights may be, that is carrying it too far.

Now those are my views of facts. Now my views of the law. I have already indicated some of my views of the law, namely, that we have got to have a body as distinguished from the United States, from the Government, as a non-physical being negligent. I don't think that the doctrine of the cases indicated in re statement of torts and in your corpus juris secundum that you called my attention to, namely, the liability of bailer for bailing out of a defective equipment and so on. I don't think that is applicable here because I think that we have got to have, we have got to have an individual employee of the Government negligent in order to fasten liability under this Act.

In analyzing the cases that have been called to my attention, I find in brief the following situation: The only cases cited to me dealing with a unit caretaker of a National Guard outfit comparable in status or identical in status unless there be some change in this later modification with Brown are U. S. vs. Holly, 192 Fed. (2d), 221, and U. S. vs. Duncan, 197 Fed. (2d), 233. Now in both of these cases the first Tenth Circuit and in the second the [558] Fifth Circuit it was held that a unit caretaker while engaged in the duties of his position with respect of caring for, serving and handling property, was an employee of the United States

and within the scope of his employment as such. In the Duncan case it happened that the facts were exactly identical. The unit caretaker there was returning to his National Guard unit with a truck which he had procured from a Government depot which is identical on the facts with our case, no room for any distinction at all, and in both of those cases, as I say, in both Holly and Duncan, the unit caretaker was held an employee within the scope of his employment. Those are the only circuit court cases that have been called to my attention that are exactly squarely on the point and both of them hold as I have stated.

Now in 206 Fed. (2d) 912, O'Toole vs. U. S., Judge Biggs speaking for the Third Circuit held a National Guardsman on summer training an employee, but the case involved a National Guardsman of the District of Columbia and Judge Biggs emphasizes the fact that residents of the District of Columbia and Guard units of the District of Columbia are a peculiar breed of animal and largely rested his decision on that circumstance, although he does refer to both Holly and Duncan with apparent approval. But I think under the circumstances the O'Toole case is not very controlling opinion, although as I say, Judge Biggs does indicate that he approves both Holly and Duncan. Now whether that brings the Third Circuit into the column of those holding a, who would hold a unit caretaker an employee acting within the scope of his employment or not, may be debatable, at least the strongest kind of inference is that that circuit is

going to hold that way when the question comes to them.

Now there are no circuit cases to the contrary. There are several circuit cases which hold that a National Guardsman other than a unit caretaker is not an employee and that I may say is held in both the Tenth and Fifth Circuits as well and apparently there is no authority to the contrary that a National Guard soldier, while not on active duty, on active federal duty, is not an employee within the meaning of this Act. Now there are a string of, oh I neglected to say that there is a District Court case *Watt vs. the U. S.*, 123 Fed. Supp. 906, District Court of Arkansas that applies the same rule although—and it is curious, it is an interesting case because in that case the unit caretaker was riding in the truck but it was being driven at the time by the unit administrative assistant and the District Court there says that both of them are employees, but that the administrative assistant did not have within his duties to drive the truck and even though the unit [560] caretaker was with him at that time, at the time held no liability because it was outside the scope of his employment. But the case doesn't add very much to it because after all that Court, that District Court is within one of the circuits and it doesn't mean very much in the way of authority when a District Court follows his own circuit.

Mr. Dovell: The Eighth Circuit, is it not, your Honor?

The Court: Is it?

Mr. Casey: A different circuit, your Honor. We checked in the beginning of the volume on that thing and this is Arkansas.

The Court: If it is a different circuit then it has a little more authoritative value than it would otherwise have because——

Mr. Casey: Eighth Circuit.

The Court: It is a fine point that isn't controlling in the situation but I just may comment on it because as far as I can see there isn't any circuit decision and there is this one District Court decision in this other circuit as you point out to me, all to the same effect. Now not any District Court case involves a unit caretaker. The District Court cases holding a National Guardsman as soldier who is not a unit caretaker I consider of no great help in our problem here [561] because that ruling is held even in those circuits that hold a unit caretaker an employee. The upshot of it all is that I don't see any authority to the contrary at the present time of controlling weight here. We don't have any decision in the Ninth Circuit, either District Court or from the Circuit itself on this question. I can't, of course, predict what the Ninth Circuit will do about it with accuracy, but I am of the impression that they will go along with the other circuits when the question comes to them. In any event for my part in it I am satisfied that the reasoning in *Holly and Duncan* is good, sound, in keeping with the meaning and intent of this Act and I am now of the impression that I should follow that line of authority. [562]

Certificate

I, Adele U. Douds, official court reporter for the within-entitled court, hereby certify that the foregoing is a true and correct transcript of the matters therein.

/s/ A. U. DOUDS.

[Endorsed]: Filed April 17, 1956; U.S.D.C.

[Endorsed]: Filed April 28, 1956; US.C.A.

[Title of District Court and Cause.]

Nos. 1747 and 1758

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the above-entitled Court, do hereby certify that pursuant to the provisions of Rule 75(O) of the Federal Rules of Civil Procedure, as amended, and Subdivision I of Rule 10, as amended, of the United States Court of Appeals for the Ninth Circuit, I am transmitting herewith all of the original papers, pleadings and exhibits in the above-entitled consolidated causes, pursuant to the written Designation of the Contents of the Record on Appeal of the defendant United States of America, and the said papers, pleadings and exhibits herewith transmitted constitute the Record on Appeal from that certain

Judgment, in consolidated Causes 1747 and 1758, of the above-entitled Court, filed and entered on December 7, 1955, to the United States Court of Appeals for the Ninth Circuit at San Francisco, California, and are identified as follows:

Cause 1747

1. Complaint. (Filed Nov. 4, 1953.)
2. Summons and Marshal's Return of Service. (Filed Nov. 17, 1953.)
3. Answer of Deft. Pac. Tel. & Tel. Co. (Filed Dec. 21, 1953.)
4. Motion to Consolidate (Causes 1747 and 1758). (Filed Apr. 30, 1954.)
5. Statement in Support Motion (1747 and 1758). (Filed Apr. 30, 1954.)
6. Affidavit of Service Motion, etc. (1747 and 1758). (Filed May 1, 1954.)
7. Note for Docket. (Filed July 1, 1954.)
8. Affidavit of Mailing. (Filed July 1, 1954.)
9. Interrogatories to Defendant. (Filed Aug. 13, 1954.)
10. Answers to Interrogatories. (Filed Sept. 22, 1954.)
11. Order of Consolidation (1747 and 1758). (Filed Oct. 19, 1954.)
12. Request for Subpoenas (1747 and 1758). (Filed Dec. 30, 1954.)
13. Motion for Order for Subpoena for Deposition (1747 and 1758). (Filed Dec. 30, 1954.)
14. Notice of Taking Depositions (1747 and 1758). (Filed Dec. 30, 1954.)

15. Deposition, Marvin G. Wubbens (1747 and 1758). (Filed Mar. 24, 1955.)

16. Deposition, W. L. Brown (1747 and 1758). (Filed Mar. 24, 1955.)

17. Deposition, Paul L. Froman (1747 and 1758). (Filed Mar. 24, 1955.)

18. Pre-trial Order (1747 and 1758). (Filed and entered Apr. 8, 1955.)

19. Trial Brief, Pac. Tel. & Tel. Co. (1747 and 1758). (Filed Apr. 14, 1955.)

20. Stipulation re medical expenses (1747 and 1758). (Filed Apr. 14, 1955.)

21. Reporter's Transcript of Court's Oral Opinion (1747 and 1758). (Filed May 27, 1955.)

22. Findings of Fact and Conclusions of Law (lodged Nov. 10, 1955) (1747 and 1758). (Filed and entered Dec. 7, 1955.)

23. Judgment (1747 and 1758) (lodged Nov. 10, 1955). (Filed and entered Dec. 7, 1955.)

24. Findings of Fact and Conclusions of Law, of Deft. United States (proposed but not signed) (1747 and 1758). (Lodged Nov. 10, 1955.)

25. Judgment, proposed by United States (1747 and 1758). (Lodged Nov. 10, 1955.)

26. Objections of United States to Plaintiffs' proposed Findings of Fact and Conclusions of Law (1747 and 1758). (Filed Nov. 10, 1955.)

27. Affidavit of Mailing Objections, etc. (1747 and 1758). (Filed Nov. 10, 1955.)

28. Amended Findings of Fact and Conclusions of Law, proposed by U. S. (1747 and 1758). (Lodged Nov. 14, 1955.)

29. Amended Objections of U. S. to Plaintiffs' proposed Findings of Fact and Conclusions of Law (1747 and 1758). (Filed Nov. 14, 1955.)

30. Affidavit of Mailing Amended Objections, etc. (1747 and 1758). (Filed Nov. 14, 1955.)

31. Cost Bill of Deft. Pac. Tel. & Tel. Co. (1747 and 1758). (Filed Dec. 12, 1955.)

32. Notice of Taxation of Costs (1747 and 1758). (Filed Dec. 12, 1955.)

33. Notice, U. S., of Appeal (1747 and 1758. (Filed Feb. 1, 1956.)

34. Order Extending Time to File Record and Docket Appeal (1747 and 1758). (Filed Feb. 21, 1956.)

35. Designation, U. S., of Record on Appeal (1747 and 1758). (Filed Apr. 16, 1956.)

36. Affidavit of Service of Designation (1747 and 1758). (Filed April 16, 1956.)

37. Reporter's Transcript of Trial Proceedings (2 volumes) (1747 and 1758). (Filed Apr. 17, 1956.)

38. Order to Transmit Original Exhibits (1747 and 1758). (Filed Apr. 25, 1956.)

Cause 1758

39. Complaint. (Filed Oct. 15, 1953.)

40. Summons and Marshal's Return of Service. (Filed Oct. 22, 1953.)

41. Stipulation for Change of Venue. (Filed Dec. 11, 1953.)

42. Answer of Defendant United States. (Filed Jan. 8, 1954.)

43. Affidavit of Mailing. (Filed Jan. 8, 1954.)

44. Motion to Strike Affirmative Defense. (Filed Jan. 27, 1954.)

45. Note for Docket. (Filed Apr. 6, 1954.)

46. Copy of letter, U. S. Attorney to Pltfs' attorneys re Motion to Strike. (Filed Apr. 12, 1954.)

47. Plaintiffs' Memo. Brief on Motion to Strike. (Filed Apr. 30, 1954.)

48. Motion to Consolidate Causes 1747 and 1758. (Filed Apr. 30, 1954.)

49. Note for Motion Docket. (Filed July 1, 1954.)

50. Interrogatories to Defendant. (Filed Aug. 13, 1954.)

51. Answers of U. S. to Interrogatories. (Filed Sept. 8, 1954.)

52. Affidavit of Mailing Ans. to Interrogatories. (Filed Sept. 8, 1954.)

53. Defendant's Memo in opposition to Plaintiffs' Motion to Strike. (Filed Sept. 24, 1954.)

54. Order Continuing Plaintiffs' Motion to Strike. (Filed Oct. 19, 1954.)

55. Motion of Plainiffs to Determine and Allow Attorney Fees. (Filed Dec. 12, 1955.)

56. Order Determining and Allowing Attorney Fees. (Filed Dec. 19, 1955.)

I further certify that as part of the Record on Appeal I am transmitting herewith the following original exhibits admitted in evidence in the trial of the above-entitled consolidated causes, to wit:

Plaintiffs' exhibits:

1. Photograph of truck and trailer.
2. Photograph of truck and trailer.

3. Photograph of plaintiff automobile.
4. Photograph of plaintiff automobile.
5. Photograph of plaintiff automobile.
6. Photograph of plaintiff automobile.
7. Certified copy of Dept. of Licenses Certificate of Weight.
8. Photostat copy of Army shipping document on truck.
9. Photostat copy of Army shipping document.
10. Photostat copy of Army shipping document.
11. Photostat copy of Army shipping document.
12. Photostat copy of issue slip.
13. Photostat copy of issue slip.
14. Photostat copy of issue slip for director.
15. Photostat copy of 13 sheets of special orders.
16. Mim. copy of Rev. Field Civ. Personnel Program, Prj. 1213 (17 pages).
17. Hospital records and ex-ray file of Pltf., prop. of Pierce County Hospital.
18. Large map.
19. Envelope contain. 10 small photos re accident.
20. X-ray film and hospital record of Pltf., from St. Peters Hospital.
21. X-ray film and hospital records of pltf. from Providence Hospital.
22. Bills (2) for service, Providence Hospital.
23. National Guard Reg. #75-16 (6 pages).
24. Photostat copy of Dept. of Army, etc.
25. Bills for medical service (10 pages).
26. Nursing bills, Pierce Co. (6 pages).
27. Drug bills (3 pages).

28. Bills, Dr. Zimmerman; 1 cancelled check.
29. Bill (1), St. Peters Hospital.
30. Pierce County Hospital bill (1).
31. Bill, Dr. Derring, dentist.
32. Encephlogram Report of Pltf.
33. Original report of Dr. Thomas.
34. Bills (5 pages).
35. Bills, Dr. MacKay.
36. Army Div. Statistics Letter.

Exhibits of Deft. Pac. Tel. & Tel. Co.:

B-1. Large sketch of area.

B-2 to B-8, inclusive: Photographs.

Exhibits of Deft. United States:

A-1. Photostat copy (9 sheets) of insurance documents, etc.

A-2. Certified copy of Army Regulations, Special Regulations, Cir. No. 34 and General Order.

A-3. Certified copy NGR.

A-4. Certified copy NGR circulars.

A-5. Certified copy Annual Report, Chief Natl. Guard Bureau.

A-6. Certified copy Annual Report, NGR, ending 6/30/51.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office on behalf of the parties hereto for the preparation of the Record on Appeal in these consolidated cases, to wit: Notice of Appeal, Defendant United States of America,

\$5.00, and that the said fee has not been paid for the reason that the appeal is being prosecuted by the United States of America.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court, at Tacoma, Washington, this 26th day of April, 1956.

[Seal] MILLARD P. THOMAS,
Clerk.

By /s/ E. E. REDMAYNE,
Deputy.

[Endorsed]: No. 15,116. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Mar-Le Wendt, Albert D. Rosellini and Pacific Telephone & Telegraph Company, a Corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed April 28, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15,116

UNITED STATES OF AMERICA,

Appellant,

vs.

MAR-LE WENDT AND ALBERT D. ROSEL-
LINI,

Appellees.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

The United States of America, appellant, states that the points on which it intends to rely are as follows:

1. The District Court erred in holding that Sgt. William Brown and Lt. Col. Hagen were federal employees within the meaning of that term as used in the Federal Tort Claims Act.

2. The District Court erred in holding that Sgt. Brown and Lt. Col. Hagen were acting within the scope of their employment for the United States within the meaning of the Federal Tort Claims Act.

3. The District Court erred in holding that Sgt. Brown and Lt. Col. Hagen were negligent.

4. The District Court erred in refusing to admit inot evidence Government's Exhibits A5 and A6.

5. The District Court erred in rendering judgment for the plaintiffs against the United States.

CHARLES P. MORIARTY,
United States Attorney,

By /s/ GUY A. B. DOVELL,
Assistant United States At-
torney.

[Endorsed]: Filed April 25, 1956; U.S.C.A.

[Title of Court of Appeals and Cause.]

DESIGNATION OF PARTS OF RECORD
TO BE PRINTED

The United States of America, appellant, designates the following parts of the record for printing by the Clerk:

1. Plaintiffs' complaint against the United States.
2. Order transferring cause, filed December 12, 1953.
3. Answer of United States.
4. Plaintiffs' motion to strike Government's first affirmative defense.
5. Answers of United States to interrogatories, filed September 8, 1954.
6. Government's memorandum in opposition to plaintiffs' motion to strike Government's first affirmative defense.

7. Order of consolidation, filed October 19, 1954.

8. Pre-trial order.

9. Transcript of proceedings April 11 through April 14, 1955. All the testimony of Lawrence Brown (pp. 56 through 112, inclusive); Lt. Col. Albert G. Hagen (pp. 466 through 488, inclusive); Capt. Marvin Glen Wubbens (pp. 170 through 193, inclusive); and Gen. Wilburn H. Stevens (pp. 194 through 248, line 6, inclusive).

Colloquy on admission of Exhibits, p. 491, line 2, through p. 492, line 25.

Court's oral remarks, p. 549, line 14, through p. 562, line 13.

10. Transcript of court's oral opinion April 14, 1955, p. 4, line 11, through p. 5, line 4.

11. Findings of fact, conclusions of law and judgment entered on December 7, 1955.

12. Notice of appeal.

13. Designation of record on appeal.

14. Statement of points on which appellant intends to rely.

15. This designation of parts of record to be printed.

CHARLES P. MORIARTY,

United States Attorney,

By /s/ GUY A. B. DOVELL,

Assistant United States At-
torney.

Affidavit of service by mail attached.

[Endorsed]: Filed April 25, 1956; U.S.C.A.

No. 15116

In the United States Court of Appeals
for the Ninth Circuit

UNITED STATES, APPELLANT

v.

MAR-LE WENDT AND ALBERT D. ROSELLINI, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF FOR APPELLANT

GEORGE COCHRAN DOUB,
Assistant Attorney General,

CHARLES P. MORIARTY,
United States Attorney,

SAMUEL D. SLADE,
MORTON HOLLANDER,

Attorneys,
Department of Justice, Washington 25, D. C.

FILED

AUG 16 1956

PAUL P. O'BRIEN, CLERK

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15116

UNITED STATES, APPELLANT

v.

MAR-LE WENDT AND ALBERT D. ROSELLINI, APPELLEES

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION*

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The jurisdiction of the district court was invoked under 28 U. S. C. 1346 (b) of the Federal Tort Claims Act. The jurisdiction of this Court rests upon 28 U. S. C. 1291 by reason of a notice of appeal filed February 1, 1956, from a judgment against the United States entered on December 7, 1955 (R. 70-72).

STATEMENT

This is an appeal from a judgment holding the United States liable under the Federal Tort Claims Act for personal injuries sustained by appellee Wendt and for property damage sustained by appellee Rosellini. The case arose from a collision between Rosellini's vehicle, operated by Mrs. Wendt, and a

truck-trailer owned by the United States but loaned to the Washington National Guard and operated by Sgt. William Brown, a Washington National Guardsman assigned to full time civilian caretaker duties for his National Guard Unit.

Brown was a sergeant in Battery C, 770th AAA Battalion, a unit of the National Guard of the State of Washington stationed at the armory in Seattle (R. 76). This unit, while federally recognized, was not then in the federal service nor on any "active federal duty" (R. 75).

As a sergeant in the Washington National Guard, Brown drilled one night a week and was paid about \$6.00 per drill by check issued by the United States Army Finance Center in Seattle (R. 58, 77). Brown was also employed as a full time civilian unit "material caretaker for [his] National Guard" unit, *i. e.*, Battery C of the 770th AAA Battalion of the State of Washington National Guard (R. 77). For this employment Brown was paid about \$315.00 monthly by check issued by the same United States Army Finance Center (R. 59, 78).

General Wilburn Stevens, who is the Adjutant General of the Washington National Guard and thus charged with the "supervision and training of the Washington National Guard under the direction of the Governor" of that State, described the "manner and nature of hiring of civilian personnel known as unit caretakers" (R. 140). He testified that "usually the unit commander [of the particular Washington National Guard unit] selects a man from his unit because the man, if he is to act in the capacity of

the caretaker * * * must be in the unit where he takes care of the property. Therefore, the unit commander is usually the man who hires the man and the papers are sent forward to my headquarters" (R. 140-141).

Pursuant to this established procedure of having the unit caretaker selected and hired by the unit commander, Brown, in order to get his job as unit caretaker, was interviewed by the Company Commander of Battery C at the Seattle Armory and by the personnel officer there (R. 79). He was also interviewed for the job at Camp Murray, which is the National Guard Headquarters for the State of Washington, by Col. Hagen, "a national Guard officer" and not a "regular army officer," who was Acting United States Property and Disbursing Officer for the Washington National Guard (R. 80, 188). "Any order that is issued out of [Col. Hagen's] office to any National Guard personnel is issued in the name of the Adjutant General" of the State of Washington (R. 203).

The hiring of Brown as unit caretaker for Battery C—which, like his firing, rested in the discretion of the State Adjutant General—was formalized in appointment papers issued by "Headquarters Military Department, State of Washington, Office of the Adjutant General" (R. 59, 188). As a unit caretaker, Brown's duties included "looking after" federal equipment and property loaned to his State and assigned to his unit, minor mechanical repairs on the equipment and the drawing of such equipment at the

State Headquarters in Camp Murray for use of his unit in Seattle (R. 59, 80-81, 145-147, 184). He also prepared, as a unit caretaker, the unit's "payrolls, morning reports, sick reports, report of change and a thousand and one reports which the company commander, being only a part time man, he can't take care of that" (R. 146). Generally, Brown was "the right-hand man to the unit commander" in getting this work done (R. 146).

On March 11, 1953, the day of the accident, Brown was directed by his unit commander and by his Battalion Administrative Officer, pursuant to an order issued by "Headquarters, Military Department, State of Washington, Office of the Adjutant General, Camp Murray, Washington," to proceed from Seattle to Camp Murray, draw a truck and trailer there, and drive it back to Battery C at Seattle (R. 59, 60, 82, 103, 131-132). Brown, complying with this State National Guard order, arrived at Camp Murray and took delivery of a United States Army 2½-ton truck which was then "on loan to the [Washington] National Guard for the purpose of training personnel and transporting equipment and personnel of the [Washington] National Guard" (R. 62-63). At the same time, a trailer was delivered at Camp Murray to another unit caretaker for Battery B of the 770th AAA Gun Battalion (R. 60).

Although the truck was equipped with a 12-volt electrical brake connection system and the trailer had a 6-volt brake system, the trailer was coupled onto the truck which had been delivered to Brown (R. 60-61). The district court found that Col. Hagen, the Prop-

erty Officer, "authorized and directed that said truck and trailer be issued to Brown" (R. 65). Because of the incompatible voltage, the brake line from the cab of the truck could not control the brakes on the trailer (R. 61, 65).

Brown, while driving the truck and trailer back to Seattle, was travelling in a northerly direction along U. S. 99 near Tacoma at the time of the accident (R. 61). Rosellini's vehicle, operated by Mrs. Wendt, was travelling in the opposite direction (R. 61). In order to avoid a parked Pacific Telephone and Telegraph Company truck which blocked one of the northbound lanes of U. S. 99, Brown applied his brakes (R. 61, 63). The weight of the unbraked trailer pushed the rear of the truck to the east, resulting in forcing the front part of the truck to the west or to the left and into the southbound lane, striking the oncoming car driven by Mrs. Wendt (R. 61, 99).

This suit was then filed against the United States under the Federal Tort Claims Act in the district court (R. 3). The complaint, seeking damages for Mrs. Wendt's personal injuries and the property damage to Mr. Rosellini's vehicle, alleged that Brown was an employee of the United States acting within the scope of his employment and that he negligently operated the truck and trailer without adequate brake connections (R. 4). Another action was filed by the same appellees against the Pacific Telephone and Telegraph Company, alleging negligence on the part of that company in failing to post adequate signals a sufficient distance south of the point on U. S. 99 where

their parked truck was blocking one of the lanes, thereby causing the truck-trailer driven by Brown to swerve over into the southbound lane. Both actions were consolidated in the court below (R. 39).

The United States, in answering, denied that Brown was negligent and denied that he was a federal employee (R. 10). In addition, the answer asserted, by way of a separate affirmative defense, that Brown was an employee of the State of Washington Military Department and that there could therefore be no recovery against the United States under the Federal Tort Claims Act (R. 12-13).

After trial, the district court ruled that Brown, at the time of the accident, was an employee of the United States acting within the scope of his employment as a unit caretaker and that he was negligent in operating the truck and trailer at a greater speed than was proper in view of the lack of adequate brake connections (R. 66). The court further ruled that Col. Hagen was an employee of the United States, that he was acting within the scope of his employment as United States Property and Disbursing Officer in authorizing the issuance of the truck and trailer to Brown, and that this authorization was negligent (R. 67). Finding further that the Telephone Company was not negligent, and that Mrs. Wendt was not guilty of contributory negligence, the court entered judgment against the United States on December 7, 1955, in the sum of \$56,404.75 for Mrs. Wendt's personal injuries and in the sum of \$1,392.33 for the damage to Mr. Rosellini's car (R. 68, 71).

QUESTION PRESENTED

Whether (a) a Washington National Guard enlisted man employed as a unit caretaker by his Washington National Guard unit which has not been ordered into the federal service and (b) a Washington National Guard officer detailed to the Washington National Guard Headquarters as United States Property and Disbursing Officer for the State of Washington are "employees of the [federal] Government" within the meaning of that term as used in the Federal Tort Claims Act so as to make the United States liable for their negligence.

STATUTES INVOLVED

1. The pertinent sections of the Federal Tort Claims Act, as codified in Title 28, U. S. C., provide:

§ 1346. United States as defendant

* * * * *

(b) * * * the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

§ 2671. Definitions

As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term—

“Federal agency” includes the executive departments and independent establishment of the United States, and corporations primarily acting as instrumentalities or agencies of the United States but does not include any contractor with the United States.

“Employee of the government” includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

2. The pertinent sections pertaining to the National Guard, as codified in Title 32, U. S. C., provide:

§ 42. Care of animals; armament, etc.

Funds allotted by the Secretary of the Army for the support of the National Guard shall be available for the purchase and issue of forage, bedding, shoeing, and veterinary services, and supplies for the Government animals issued to any organization, and for animals owned or hired by any State, Territory, District of Columbia, or National Guard organization, not exceeding the number of animals authorized by Federal law for such organization and used solely for military purposes, and for the compensation of competent help for the care of material, animals, armament, and equipment of organizations of all kinds, under such regulations as the Secretary of the Army may prescribe.

The compensation paid to caretakers who belong to the National Guard, as herein authorized, shall be in addition to any compensation authorized for members of the National Guard under any of the provisions of this title.

* * * * *

Funds hereafter appropriated under the provisions of this title, as amended, for the support of the National Guard of the several States, Territories, and the District of Columbia, shall be supplemental to moneys appropriated by the several States, Territories, and the District of Columbia, for the support of the National Guard, and shall be available for the hire of caretakers and clerks: *Provided*, That the Secretary of the Army shall, by regulations, fix the salaries of all caretakers and clerks hereby authorized to be employed, and shall also designate by whom they shall be employed.

§ 42a. Same; hire of caretakers for clerical work

Moneys hereafter appropriated under the provisions of this title, as amended, for compensation of help for care of material, animals, armament, and equipment in the hands of the National Guard of the several States, Territories, and the District of Columbia shall be available for the hire of caretakers who may also perform clerical duties incidental to their employment, and such moneys may be used as supplemental to money appropriated by the several States, Territories, and the District of Columbia for the support of the National Guard: *Provided*, That nothing herein con-

tained shall be construed to prevent the utilization of the services of such caretakers on duties other than those indicated above, if such additional services do not interfere with the complete performance of the duties for which they are employed under the provisions of this section: * * *.

§ 49. Property and disbursing officers

The Governor of each State and Territory and the Commanding General of the National Guard of the District of Columbia shall appoint, designate, or detail, subject to the approval of the Secretaries of the Army and Air Force, a qualified officer of the National Guard of the United States or the Air National Guard of the United States, who is an officer of the National Guard or Air National Guard of the State, Territory, or District of Columbia and who shall be the United States property and fiscal officer. The President may with the consent of the officer concerned, if such officer is not on active duty, order him to active duty to serve as United States property and fiscal officer of the State, Territory, or the District of Columbia, for which appointed, designated or detailed, and upon relief from assignment as United States property and fiscal officer, he shall revert to his National Guard or Air National Guard status. The United States property and fiscal officer shall receipt and account for all funds and property belonging to the United States in possession of the National Guard or Air National Guard of the State, Territory, or the District of Columbia, and shall make such returns and reports pertaining there-

to as may be required by the appropriate Secretary. Before entering upon his duties as property and fiscal officer he shall be required to give good and sufficient bond to the United States, the amount thereof to be determined by the Secretaries of the Army and the Air Force, for the faithful performance of his duties and for the safekeeping and proper disposition of the Federal property entrusted to his care. He shall receive pay and allowances provided by law. The appropriate Secretary shall cause an inspection of the pertinent accounts and records of the United States property and fiscal officer to be made by an Inspector General of his Department at least once each year. The Secretaries shall make joint rules and regulations necessary to carry into effect the provisions of this section, which rules and regulations shall establish a maximum grade, not above colonel, for the United States property and fiscal officer of each State, Territory, and the District of Columbia, which grade shall be commensurate with the duties, functions, and responsibilities of the office.

SPECIFICATION OF ERRORS RELIED UPON

1. The district court erred in holding that Sgt. William Brown and Lt. Col. Hagen were federal employees within the meaning of that term as used in the Federal Tort Claims Act.

2. The district court erred in holding that Sgt. Brown and Lt. Col. Hagen were acting within the scope of their employment for the United States within the meaning of the Federal Tort Claims Act.

3. The district court erred in rendering judgment for the plaintiffs against the United States.¹

SUMMARY OF ARGUMENT

The judgment entered by the court below against the United States in this Federal Tort Claims Act suit is predicated on its holding that certain state National Guard personnel, *i. e.*, unit caretakers and property and disbursing officers, are “federal” rather than state employees. The correctness of that holding is the basic question presented by this appeal.

We believe that the holding constituted plain and reversible error. In Point I, we show that application of the conventional “control” test, which is the touchstone for determination of the existence of an employment relationship, compels the conclusion that the unit caretaker and the property officer are state rather than federal employees. This conclusion is firmly supported by two fundamental considerations discussed in Points II and III (pp. 26, 31): (1) the constitutional and historical development of the Na-

¹ The record also makes it plain that the court below committed additional reversible error in holding that Sgt. Brown and Lt. Col. Hagen were negligent in refusing to admit into evidence certain Government exhibits. While we in no way abandon those points, we do not stress them here because we believe it important to focus attention on the more serious error committed by the court in holding that Brown and Hagen were not state employees but were federal employees for whose torts the United States Government must respond under the Federal Tort Claims Act.

tional Guard as a state organization except when called into active federal service and (2) the long line of consistent holdings that National Guardsmen, not called into federal service, are not federal employees under the Federal Tort Claims Act.

Point IV reinforces even further the view that the Washington Guard personnel here involved are not federal employees for whose torts the United States Government, rather than the State of Washington, must respond. We show there that the federal aid extended to the state National Guards is only one aspect of the tremendous grant-in-aid program under which the national Government finances and subsidizes multitudinous local projects carried on by the state employees. Imposition of liability on the United States for extending federal aid to the National Guards is, we submit, as improper as would be the imposition of liability for federal financial assistance to any of the other state-operated projects. Against this background, we submit that it would require unequivocal language in the Federal Tort Claims Act before the door of the federal treasury is opened up to the tremendous number of potential claims based on federal financial participation in state National Guard or other grant-in-aid programs. There is, of course, no such clear declaration of liability in the Federal Tort Claims Act. Indeed, nowhere in the Act is there even a remote suggestion of potential federal liability for such claims.

ARGUMENT

I

Federal liability is precluded here because the United States had no right of control over the unit caretaker and the property officer

The basic test in determination of the existence of an employment relationship for the purpose of imposing vicarious liability on an employer for the negligent conduct of his employee always has been whether the employer had the right to control the employee in the activities which gave rise to the tortious misconduct. Application of that test to the facts of this case conclusively establishes that neither Brown, the unit caretaker, nor Hagen, the property officer, were employees for whose torts the United States may be held liable under the Federal Tort Claims Act.

A. Tort liability of an employer is predicated on his right to control the employee's conduct

Although many factors are considered in determining whether or not an individual is an employee of the defendant for the purpose of saddling the defendant with a tort liability for the negligence of the alleged employee, the basic criterion at all times has been the defendant's right of control. Consistent holdings uniformly recognize that an essential element of the employer's vicarious liability in tort is that the employer must have the right and power to direct and control the employee in the performance of the negligent act or omission which caused the injury. *Board v. Hearst Publications*, 322 U. S. 111, 120-121,

128; *The Standard Oil Co. v. Anderson*, 212 U. S. 215, 221; *Harris v. Boreham*, 233 F. 2d 110, 115-116 (C. A. 3); *Beck v. Washington, Virginia & Maryland Coach Co.*, 220 F. 2d 830, 831 (C. A. D. C.); *Baber v. Akers Motor Lines*, 215 F. 2d 843, 845 (C. A. D. C.); *United States v. Eleazer*, 177 F. 2d 914, 916-7 (C. A. 4), certiorari denied, 339 U. S. 903); *Craige v. Austin Powder Co.*, 91 F. 2d 664 (C. A. 4); *P. F. Collier & Son Co. v. Hartfeil*, 72 F. 2d 625 (C. A. 8); *Phelps v. Boone*, 67 F. 2d 574 (C. A. D. C.), certiorari denied, 291 U. S. 677; *Standard Oil Co. v. Parkinson*, 152 Fed. 681, 682 (C. A. 8); *Brady v. Chicago and G. W. Ry. Co.*, 114 Fed. 100 (C. A. 8); *Leech v. Sultan R. & Timber Co.*, 161 Wash. 426, 297 Pac. 203; *Beasely, Etc. v. Whitehurst*, 152 Va. 305, 311, 147 S. E. 194, 196; *Restatement, Agency*, § 228, comment c; § 229, comment c.

As summarized in *Phelps*, "The usual test" for "determination of liability for a negligent act on the part of a servant, is the right or the power on the part of the person charged, to command and control the servant in the performance of the causal act at the moment of performance." 67 F. 2d at 575. "And," as observed again in *Baber v. Akers Motor Lines*, 215 F. 2d 843, 845, "this right of control and direction we think has to do with the operation of the car, not merely with control of the destination." Adhering to the same rule in Washington, the *Leech* case points out that to establish the master-servant relationship for the purposes of a *respondeat superior* liability, it must at least be shown that the master had full control, or the right to control, the manner and

details of the servant's activities at the time of the accident. 161 Wash. 426, 427, 297 Pac. 203, 204.²

Similarly, the late Judge Sanborn, in reiterating the rule, observed that:

The test of one's liability for the act or omission of his alleged servant is his right and power to direct and control his imputed agent in the performance of the causal act or omission at the very instant of the act or neglect. There can be no recovery of a person for the act or omission of his alleged servant under the maximum, "respondeat superior," in the absence of the right and power in the former to command or direct the latter in the performance of the act or omission charged, because in such a case there is no superior to respond. [*Standard Oil Co. v. Parkinson*, 152 Fed. 681, 682 (C. A. 8).]

The *Restatement*, recognizing that the basic precondition of an employment relationship for the purpose of imposing tort liability on an employer is the right of control on the part of the employer, defines a servant as "a person employed to perform service for another in his affairs and *who, with respect to his physical conduct in the performance of the service, is subject to the other's control or right to control.*" [Emphasis supplied.] *Restatement, Agency*, 220 (1).

The same rule has always applied to suits under the Federal Tort Claims Act. Thus, when the Tort

² The holding that the tortfeasor was not defendant's employee was based squarely on the fact that the defendant had no "control or supervision of Jones in the operation of the car, or the manner in which delivery * * * was to be effected." *Leech v. Sultan R. & Timber Co.*, 161 Wash. 426, 433, 297 Pac. 203.

Claims Act was a relatively new statute, Chief Judge Parker enunciated the rule in exonerating the Government from liability under the Tort Act (*United States v. Eleazer*, 177 F. 2d 914, 916 (C. A. 4), certiorari denied, 339 U. S. 903):

The ground of liability of the master for the negligent act of the servant is that the * * * master * * * has the right of control * * *.

Recently, the Third Circuit, in a case strikingly similar to the one now here, again emphasized that the “control” test is dispositive in determining whether the tortfeasor is an employee of the United States for the purpose of Tort Claims Act liability. *Harris v. Boreham*, 233 F. 2d 110, 116. This Third Circuit case was decided by a panel including Chief Judge Magruder and Judge Maris. The question there, like the question here, was whether the tortfeasor was a federal employee or an employee of a local government. There, as here, his salary was “paid from federal funds.” 233 F. 2d 110, 115. But the court correctly observed that that “merely” meant that “Congress was willing to this extent to subsidize the local government.” 233 F. 2d 110, 115. And, in ruling that he was a local employee because he was not “under the supervision and control” of the United States, Judge Maris’ opinion states (233 F. 2d 115–116):

Boreham, the Superintendent of Public Works of the Municipality of St. Thomas and St. John, was in charge of a department of the government of that municipality under the general supervision and control of the Gov-

ernor. It is true he had been appointed to that office in 1935 by the Secretary of the Interior upon the recommendation of the Governor of the Virgin Islands, and had continued in office after the passage of the Organic Act of 1936. It is also true that his salary was paid from federal funds appropriated by Congress for the Government of the Virgin Islands and the municipalities. It is upon these facts that the plaintiff bases her contention that Boreham must be regarded as having been, at the time here involved, an employee of the Government of the United States within the meaning of the Federal Tort Claims Act. We do not think that this conclusion follows.

Aside from the letter appointing him to the position, the record does not disclose any order or directive issued by the Secretary of the Interior or any other department or agency of the United States in respect to Boreham's duties as Superintendent of Public Works of the Municipality of St. Thomas and St. John. *On the contrary it appears that his duties were being performed under the supervision and control of the chief executive of the municipality, the Governor.* * * * We are satisfied that Boreham does not come within this definition [of federal employee, 28 U. S. C. 2671, pp. 7-8] for he was not an officer or employee of a federal agency nor was he, in supervising the maintenance of the streets of Charlotte Amalie, acting on behalf of such an agency. On the contrary it is clear that he was an official of the Government of the Municipality of St. Thomas and St. John which, as we have pointed out, was a body politic quite distinct from the Gov-

ernment of the United States and was, therefore, not a "federal agency" within the meaning of the Act.³ [Emphasis supplied.]

B. The State of Washington and not the United States had the right of control over the unit caretaker and the property officer

Applying the fundamental "control" test to the facts of this case, we now show that the State of Washington rather than the Federal Government had the responsibility and authority to supervise and control the activities of (1) Brown as unit caretaker and (2) Hagen as property officer.

1. *Brown, the Unit Caretaker.* There can be no dispute that the decision to hire Brown as a unit caretaker⁴ and the examination of his qualifications

³ See also Chief Judge Hutcheson's recent holding that the United States, in a Federal Tort Claims Act suit, cannot be held liable under *respondeat superior* where "no control whatever" is assumed by the United States. *Moye v. United States*, 218 F. 2d 81, 83 (C. A. 5). For further application of the rule, see the recent opinion by Chief Judge Magruder in *Conversions & Surveys v. Roach*, 204 F. 2d 499 (C. A. 1). The basic question in that case was whether the employer could be held liable under *respondeat superior* for the employee's negligent operation of his privately owned car. In holding that there was no liability, Chief Judge Magruder noted that there was no "evidence warranting the inference that the owner, while permissively using his car on company business, has yielded up to his employer this right to control speed, route, and the other details of operation." 204 F. 2d 499, 501.

⁴ The unit caretaker is a position long established in the National Guard. For many years prior to 1916, militia target range caretakers were utilized by National Guard units. Par. 19, NGR 78, 1 Nov 27, points out that target range-keepers "will be *employed by State* authorities at federal expense * * *" (emphasis supplied). The first statutory authorization for the position, however, appeared in Section 90 of the National Defense Act of 1916 (32 U. S. C. 42, 42a, p. 8). This statute has been amended nine times since 1916. The legislative re-

for that job were made by Washington National Guard officers and not by any federal officials. The record establishes that the routine procedure was for the unit caretaker to be selected and hired by the

ports on the various amendments consistently allude to the fact of state control over these employees. H. Rep. No. 674, 67th Cong. 2d Sess.; H. Rep. No. 397, 68th Cong., 1st Sess.; Sen. Rep. No. 785, 69th Cong., 1st Sess.; H. Rep. No. 400, 70th Cong., 1st Sess.; Sen. Rep. No. 118, 73d Cong., 1st Sess.; Sen. Rep. No. 635, 74th Cong.; 1st Sess.; H. Rep. No. 2104, 75th Cong., 3d Sess.; Sen. Rep. No. 1788, 75th Cong.; 3d Sess.; see H. Rep. No. 2681, 75th Cong., 3d Sess.; H. Rep. No. 2986, 76th Cong., 3d Sess., H. Rep. No. 2814, 76th Cong., 3d Sess.; Sen. Rep. No. 1788, 76th Cong., 3d Sess.

The existence of state rather than federal control is shown still further by the fact that the caretaker is hired and discharged locally by the authority of the several Adjutants General of the various states, territories, and the District of Columbia. R. 188; par. 1, NGR 75-16, 29 Dec. 47, pp. 42a-53a; pars. 4, 5, NGB Cir 4, 23 Jan 50. He is not entitled to federal retirement benefits and is not an employee of the United States under the Civil Service System. *Federal Personnel Manual*, Chapter R5-20. He is covered by Federal Social Security only if the state which employs him makes a pro rata contribution to the system on his behalf. His employment is directed, in its day-to-day detail, by his unit commander or the unit administrative assistant (par. 2.b.1, NGR 75-16, 29 Dec 47, p. 43a; par. 4, NGB Cir 4, 23 Jan 50), and he is instructed and trained by his unit commander in the performance of his duties (par. 2, NGR 75-3, 2 Feb 51). In view of this day-to-day control by state officers and the complete lack of control by any federal officers, par. 26.k.1, NGR 50 (2 Nov 46) notes that:

"Employees hired by the States and Territories, including United States property and disbursing officers, accounting employees, caretakers, range keepers, temporary laborers, and others, are not considered federal employees, although paid from funds appropriated for the National Guard (27 Comp. Dec. 344, 19 Comp. Gen. 326 and 21 *id.* 305); Therefore, deductions for Civil Service retirement will not be made from the pay of these employees except in the District of Columbia."

commander of the appropriate Washington National Guard unit, unquestionably a state officer (R. 140-141). Thus, Brown, in order to get the job as unit caretaker, was interviewed by the Company Commander of Battery C, 770th AAA Battalion, Washington National Guard (R. 79). He was also interviewed for the job at Camp Murray, which is not a federal Army post but is the National Guard Headquarters for the State of Washington (R. 80, 188, 203). The selection of Brown as caretaker was formalized by appointment papers issued not by any federal officer but by state officers of the "Headquarters, Military Department, State of Washington, Office of the Adjutant General" (R. 59, 188).

Similarly, all of the orders to Brown directing the discharge of his unit caretaker duties were issued by the state officers of the Washington National Guard and never by any federal officers. Accordingly, it was pursuant to orders of these state officers that Brown, at the time of the accident, had been directed to draw certain equipment at Camp Murray and return it to Battery C, his Washington National Guard unit at Seattle (R. 59, 60, 82, 103, 131-132). The truck and trailer he drove back to Seattle, as ordered by the state officers, was federally owned but "on loan to the Washington National Guard" (R. 61-62).

The record thus establishes that Brown was hired by state officers of the Washington National Guard, that he received his orders from them, and that they directed every phase of his employment duties as a unit caretaker, including those he was performing at the time of his return trip to Seattle. In short, he

was then under the supervision and control of these state officers and not under the supervision and control of any United States Army or other federal personnel (R. 80). Since Brown was not under the supervision and control of federal employees, the district court erred, we submit, in concluding that he was employed by the United States within the meaning of the Federal Tort Claims Act.

2. *Hagen, the Property Officer.* Application of the same control test demonstrates that Col. Hagen, the United States property and disbursing officer for the Washington National Guard, was also not a federal employee under the Federal Tort Claims Act. The property officer is a state National Guard officer appointed by the governor of the state, subject to the approval of the Secretary of the Army or Air Force. 32 U. S. C. 49 (p. 10). This position was created for the purpose of assisting the various states in the protection of federal property and equipment furnished to the state for the use of its National Guard units and for which the governors of the individual states are responsible. 19 Comp. Gen. 326.⁵

At all times, as was true with respect to orders issued by Col. Hagen in this case, any order that is

⁵ Par. 3, SR 130-420-1, 21 Nov 49, provides: "Definitions.—When used in these regulations, the words or terms given below will be construed to have the following meaning:

"a. United States property and disbursing officer (USP&DO).—An officer required to maintain accountability and prescribed records of supplies received or held for issue within the State, indicating by item, the receipt, issue or other disposition of such property. Such persons have supervisory responsibility for supplies on hand but not under their immediate control, as de-

issued by the property officer "to any National Guard personnel is issued in the name of the Adjutant General" of the state rather than in the name of any federal officer (R. 203). The record here also establishes that Col. Hagen was not subject to any federal control because at all times he was subject to the supervision and control of the Adjutant General of the State of Washington, who could exercise this control by overruling the property officer or countermanding his orders (R. 203). The exercise of this close control by the State Adjutant General over the property officer is further manifested by the fact that the property officer's principal responsibilities included "acting as his adviser in logistical matters and as a staff officer on his staff" (R. 202, 203).

This supervision and control by state officers, just as in the case of unit caretakers, require, we submit, a holding that the property officer is a state employee, notwithstanding the fact that his appointment is approved by the Secretary of the Army or Air Force and his pay is derived from funds appropriated by the United States for the support of the local National Guards. See *Harris v. Boreham*, 233 F. 2d

finned in AR 35-6520. This officer is accountable for Federal property issued the State. (See sec. 67, National Defense Act, as amended.)"

The background and reasons for the existence of the USP&DO are summarized in 27 Comp. Dec. 994, 995. See par. 6, SR 130-420-1, 21 Nov 49, for delineation of the responsibilities of the USP&DO.

110, 115, 116 (C. A. 3), pointing out that the absence of federal control precludes a finding of federal employment even though (1) the employee there involved was actually appointed by the United States Secretary of the Interior and (2) his salary was paid from federal funds appropriated by Congress. See also 19 Comp. Gen. 326; 21 Comp. Gen. 305; 29 Comp. Gen. 421; 27 Comp. Dec. 344; 29 Comp. Gen. 277; 22 Comp. Gen. 864.⁶

The same view—that a property officer is not a federal employee—recently has been reasserted by the United States Court of Claims in *Hyde v. United States*, 139 F. Supp. 752. The question in *Hyde* was whether the property disbursing officer for the State of Tennessee performed “active Federal service” creditable to federal retirement under the Act of June 29, 1948, 62 Stat. 1081, as amended, 63 Stat. 693. In its opinion the Court of Claims, after setting forth the text of the “property officer” provision of the National Defense Act of 1916, 32 U. S. C. 49 (p. 10), flatly rejects the contention that property officers perform federal services or are federal employees (139 F. Supp. 752, 756):

From the reading of the above act it is apparent that plaintiff [i. e., the property officer] was under no “competent Federal

⁶ In 22 Comp. Gen. 864 (March 4, 1943) the Comptroller General reaffirmed the position taken earlier in 19 Comp. Gen. 326, ruling that despite the name of their position, *i. e.*, “United States property and disbursing officers,” these state National Guard officers are not officers of the United States.

orders" when he embarked on his duties in connection therewith. He merely was appointed by the Governor of Tennessee to do a job, and the fact that approval of his appointment by the Secretary of the Army was necessary, cannot be construed to mean he was "ordered to active duty under competent Federal orders."

U. S. property and disbursing officers are not subject to military orders or military disciplinary action. Plaintiff could quit at any time, could be removed by the Governor of Tennessee at any time, and could not be ordered out of the State of Tennessee. It would indeed be a novel situation wherein a man ordered to active duty under competent Federal orders could be so removed.

Furthermore, the act provides that the governor can appoint the adjutant general of the state to such position. Certainly the adjutant general cannot be said to be ordered to active duty under competent Federal orders. He would assume the mixed duties and responsibilities arising out of the Federal and State relationship with respect to National Guard matters. It is to be noted in that respect that the National Defense Act, *supra*, also provided a salary for the increased responsibilities. It is also to be noted that the salary authorized (\$1,300 per annum) has no connection with any salary paid any member of the military forces of the United States. Furthermore, he could be prosecuted under Federal criminal law for the mishandling of Federal funds in his possession. *Woodford v. United States*, 8 Cir., 77 F. 2d 861. Nowhere does it appear that he

could be court-martialed therefor. Moreover, he has always been regarded as a state officer and not subject to the Federal annual leave laws. 19 Comp. Gen. 326.

Viewed in the light of the evidence and findings in this case, plaintiff's service as property and disbursing officer of the United States could not be considered as active Federal service within the meaning of section 303 of the Act of June 29, 1948, *supra*.

Nor can Col. Hagen's service here as property and disbursing officer for the State of Washington National Guard be considered "federal" service. To the contrary, application of the reasoning of the *Hyde* and *Harris* cases, and of the "control" test on which those two cases are based, compels the same conclusion here, *i. e.*, that Col. Hagen as property officer is not a federal employee within the meaning of that term as used in the Federal Tort Claims Act.

II

The historical development of the National Guard as a State organization confirms the view that National Guard unit caretakers and property officers are not Federal employees

In Point I we have taken the position that National Guard personnel, including caretakers and property officers, are state employees because daily control over their activities is reserved to and in fact exercised by the various states. This position is firmly supported by the traditional relationship between the Federal Government and the state National Guards. We now trace that relationship, based on the United States Constitution and statutes.

The National Guards of the several states are the militia recognized in Article I, Section 8, clauses 15 and 16, of the Federal Constitution. The history of the development of the National Guard from the disorganized and often undisciplined home-defense force which was the early militia has been a history of zealous retention by the states of control over their military forces against what were believed to be attempts to "federalize" the National Guard.⁷ The result is that, although the process of development of the National Guard to an effective reserve component of the Army of the United States (Section 58 of the National Defense Act of 1916, as amended, 50 U. S. C. 1111, 1112) has been one of increased exercise by Congress of its constitutional power "To provide for organizing, arming, and disciplining" of the militia (U. S. Const., Art I, § 8, cl. 16), it is clear that the National Guard of a state still remains a state organization except when called into active federal service. Section 709 of the Armed Forces Reserve Act of 1952, 665 Stat. 503, 50 U. S. C. 1119, as if to eliminate all possible doubt on this score, provides in explicit terms that:

Except when ordered thereto in accordance with law, members of the National Guard of

⁷ For a history of the statutes relating to the National Guard and its predecessors, see Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181 (1940); Colby and Glass, *The Legal Status of the National Guard*, 29 Va. L. Rev. 839 (1943). For recent assurance that state control over the National Guard has not been impaired or the National Guard "federalized", see Sen. Rept. No. 1795, 82d Cong., 2d Sess., on the Armed Forces Reserve Act of 1952, pp. 11, 43.

the United States and of the Air National Guard of the United States shall not be on active duty in the service of the United States. When not on active duty in the service of the United States, they shall be administered, armed, uniformed, equipped and trained in their status as members of the National Guard and Air National Guard of the several States, Territories, and the District of Columbia.

Certain qualifications for federal recognition of National Guard officers are of course established by federal law (32 U. S. C. 111-115). But Article I, Section 8, clause 16, of the Constitution specifically reserves to the states the power of appointment of officers, and Section 246 of the Armed Forces Reserve Act of 1952, 66 Stat. 495, 50 U. S. C. 981, provides that:

When not on active duty, members of the reserve components shall not be held or considered to be officers or employees of the United States, or persons holding any office of profit or trust or discharging any official function under or in connection with any department or agency of the United States, solely by reason of their appointments, oaths, commissions, or status as such, or any duties or functions performed or pay and allowances received as such.

That the state National Guards remain under state control while not in active federal service is further manifested by the authority which the states exercise over these military forces. Although Section 61 of the National Defense Act, as amended, 32 U. S. C. 194, prohibits states from maintaining troops in time

of peace other than in accordance with the organization prescribed by that Act, it specifically provides that:

* * * Nothing contained in this Act shall be construed to limit the rights of the States in the use of the National Guard within their respective borders in time of peace * * *.

The states may, and frequently do, use their National Guards to enforce state laws and to maintain peace and order. Both officers and enlisted personnel are required to take an oath promising to obey the orders of the governor of the state. 32 U. S. C. 112, 123.⁸ And, as already noted, the Federal Constitution reserves to the states all authority over the appointment of officers. Moreover, the states "have the right to determine and fix the location of units and headquarters of the National Guard within their respective borders" (32 U. S. C. 6), and "* * * no change in allotment, branch, or arm of units or organizations wholly within a single State [can] be made without the approval of the governor of the State concerned" (32 U. S. C. 5).

⁸ The required oath of allegiance is to both the United States and the state and the promise is to obey the orders of the President of the United States and those of the governor "* * * because the Governor is commander in chief of the National Guard until Congress declares an emergency to exist and the guard becomes an actual part of the National Army, when the President becomes commander in chief." *Bianco v. Austin*, 204 App. Div. 34, 197 N. Y. S. 328, 331. The President is "commander in chief of the militia only when called into the actual service of the United States." *Johnson v. Sayre*, 158 U. S. 109, 115.

It is true that certain standards are established by federal law for the instruction, training, and discipline of the state National Guards (32 U. S. C. 61-76), that provision has been made for the issuance of arms, equipment, material, uniforms, etc., to the state National Guards (32 U. S. C. 33), and that a sum of money is annually appropriated for payment out of the United States Treasury for their support. 32 U. S. C. 21. However, the only sanction to enforce compliance by the states with the standards established by the United States is the withdrawal of federal recognition and entitlement to the aids and benefits offered by the United States. 32 U. S. C. 24.

As this review of the constitutional and statutory relationship between the National Guard and the United States shows, the National Guard possesses a dual character. It is both a state military organization and a reserve component of the Army of the United States. But the relationship between the National Guard and the United States, as explained above, leaves no doubt that members of the National Guard are only to be considered as in the active service of the United States when ordered thereto in accordance with law, and that at all other times National Guard personnel are state employees. Concededly, as the court below found (R. 63), the Washington National Guard unit here involved had not been ordered or called into "the active federal military services" at the time in question. It follows that the Washington National Guard personnel were then state and not federal employees.

III

The consistent holdings that National Guard personnel are not employees of the United States within the meaning of the Federal Tort Claims Act should be applied here

In view of the clarity with which the status of National Guardsmen is defined, it is not surprising to find that every court which has considered the question has held that guardsmen who have not been called to the active service of the United States, are not employees of the United States within the meaning of the Federal Tort Claims Act. See, *e. g.*, *Dover v. United States*, 192 F. 2d 431 (C. A. 5); *Williams v. United States*, 189 F. 2d 607 (C. A. 10); *United States v. McCranie*, 199 F. 2d 581 (C. A. 5), certiorari denied, 345 U. S. 922; *Satcher v. United States*, 101 F. Supp. 919 (W. D. S. C.); *Glasgow v. United States*, 95 F. Supp. 213 (N. D. Ala.); *Mackay v. United States*, 88 F. Supp. 696 (D. Conn.). Indeed, it was well established before the passage of the Federal Tort Claims Act by decisions of both federal and state courts that such National Guardsmen were not officers, employees, or troops of the United States but the troops, employees, or agents of the states. *United States v. Dern*, 74 F. 2d 485 (C. A. D. C.); *O.-W. R. R. & N. Co. v. United States*, 60 C. Cls. 458; *Illinois Central R. R. Co. v. United States*, 60 C. Cls. 499; *Ala. Gt. Southern R. R. v. United States*, 49 C. Cls. 522; *Bianco v. Austin*, 204 App. Div. 34, 197 N. Y. S. 328 (App. Div., 1st Dept.); *Gibson v. State*, 19 N. Y. S. 2d 405, 173 Misc. 893 (C. Cls. N. Y.), affirmed, 21 N. Y. S. 2d 362; *Spence v. State*, 288 N. Y. S. 1009, 159 Misc. 797 (C. Cls. N. Y.);

Dicicco v. State, 273 N. Y. S. 937, 152 Misc. 541 (C. Cls. N. Y.); *Lind v. Nebraska National Guard*, 144 Neb. 122, 12 N. W. 2d 652; *Nebraska National Guard v. Morgan*, 112 Neb. 432, 199 N. W. 557; *Baker v. State*, 200 N. C. 232, 156 S. E. 917; *Globe Indemnity Co. v. Forrest*, 165 Va. 267, 182 S. E. 215; *State v. Industrial Commission*, 186 Wis. 1, 202 N. W. 191; see also 19 Comp. Gen. 326; 17 Comp. Gen. 333.

Notwithstanding the foregoing considerations and the long line of decisions to the effect that National Guardsmen are not employees of the Federal Government within the meaning of the Federal Tort Claims Act, the Court of Appeals for the Tenth Circuit in *United States v. Holly*, 192 F. 2d 221, held that a unit caretaker of the Oklahoma National Guard was a federal employee within the meaning of the Tort Claims Act. The Fifth Circuit followed *Holly* in *United States v. Elmo*, 197 F. 2d 230, and *United States v. Duncan*, 197 F. 2d 233. *Holly* has also been accepted by a majority of the Court of Appeals for the Second Circuit in *Courtney v. United States*, 230 F. 2d 112.⁹

⁹ However, as the dissent in the latter case points out, the majority opinion, as well as the *Holly* and *Elmo* cases, on which it is based, fail to recognize that supervision and control over the activities of the unit caretakers are retained by the states and cannot be exercised by the Federal Government. 230 F. 2d 115. Since members of the Guard must "come under such control of the federal government" to be its servants and since the unit caretaker and property officer do not come under such federal control, the dissent in the *Courtney* case correctly concludes that they may not be viewed as federal employees for whose torts the United States Government must respond. 230 F. 2d 115.

The trial court in this case also relied on the *Holly* decision in holding the Government liable (R. 216). The question, however, is an open one in this Circuit. It is our position that *Holly* was incorrectly decided and that the district court therefore erred in relying on it.

The *Holly* opinion cites no earlier holding in support of its conclusion. It seems instead to be grounded on the fact that caretakers are paid from federal funds. But it is, we submit, a complete non sequitur to infer from that fact alone that the caretaker is necessarily subjected to the type of supervision and control by the Federal Government sufficient to constitute him a federal employee for the purpose of assessing tort liability. *Harris v. Boreham*, 233 F. 2d 110, 116 (C. A. 3); *Glasgow v. United States*, 95 F. Supp. 213, 214 (N. D. Ala.) See also *Fries v. United States*, 170 F. 2d 726 (C. A. 6), cert. den. 336 U. S. 954. There are, as we show below, scores of instances where the Federal Government, through its subsidy and grant-in-aid program, finances state-operated projects. But, in the absence of control in the hands of the United States, there can be no federal liability. As the dissenting judge in *Courtney v. United States* declared in explaining his reasons for rejecting *Holly* and ruling that caretakers are not under the control of the United States and hence are not its employees (230 F. 2d 114, 115):

* * * it is undisputed here that the decision to hire Truex [the unit caretaker] and the examination of his qualifications was made by National Guard officers, that he received his

training from National Guard officers, and that he received his orders and instructions from National Guard officers. From all that appears in the record Truex never had any contact in the course of his duties with any federal officer or employee. *Since Truex was under the supervision and control of persons who were not federal employees, it is difficult to conclude that he was employed and controlled by the United States.* It is not enough to say that he was paid from federal funds; members of the National Guard are themselves paid from federal funds, 32 U. S. C. A. Chapter 10, but this has not been held to make them federal employees.

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But it seems to me that examination of the Defense Act itself reveals that the special authority of the Secretary of the Army with respect to caretakers extends only to the power to fix their salaries and designate by whom they are to be employed. 32 U. S. C. A. § 42. Apart from these powers he has no greater control over caretakers than over enlisted men and officers of the National Guard. With respect to all members of the federally recognized National Guard the Secretary has wide powers to prescribe regulations, but these are merely pursuant to the federal government's power to attach conditions to the use of federal funds; they do not indicate that members of the Guard have come under such control of the federal government as to be its servants. The Secretary of the Army himself would have no authority to issue an order directly to an officer or member of the guard nor to the caretaker involved here. He may merely prescribe regulations to which

the states must adhere if they wish to continue to receive federal funds for the employment of such caretakers. This view is reinforced by the clear indication in the Defense Act that the states have the duty of maintaining and protecting the federal property entrusted to them. 32 U. S. C. A. §§ 33, 417. *United States v. Holly*, 10 Cir., 1951, 192 F. 2d 221; *Elmo v. United States*, 5 Cir., 1951, 197 F. 2d 230; and *United States v. Duncan*, 5 Cir., 1952, 197 F. 2d 233, stand squarely opposed to this conclusion, but they do not sufficiently distinguish between control of the caretakers and the attachment of conditions to the receipt of federal funds for their compensation.

With the enormous proliferation of federal government activities directly and indirectly through subsidies and other types of remuneration, it seems to me a holding that Truex was a federal employee would open the door of the federal treasury to a great number of claims which Congress never had in mind. *The federal government is certainly not liable for the activities of every person into whose pay check federal funds ultimately find their way.* Nor can it make a difference that the federal government attaches some conditions to the use of those funds. I am unable to find the United States answerable for the acts of a caretaker like Truex without some more explicit statement by Congress that it so intends. [Emphasis supplied.]

The persuasive reasoning of this dissenting opinion is in no way answered by the majority opinion in *Courtney* or by the Tenth Circuit's opinion in *Holly*, on which the majority relies. We urge this Court,

therefore, to follow that reasoning and to hold that the National Guard personnel here involved, not being subject to the control of the United States, may not for that reason be deemed federal employees.

IV

In the absence of a clear and unequivocal declaration of liability in the Federal Tort Claims Act, Congress should not be presumed to have exposed the Federal Government to tort liability for its participation in the National Guard or any other grant-in-aid program

We have shown in Point I that there can be no liability here on the part of the United States because the employees involved were at all times subject to the supervision and control of state officials rather than federal. Indeed, the constitutional and statutory relationship between the United States and the state National Guards effectively precludes the exercise of such control by the Federal Government over National Guard personnel such as unit caretakers and property officers. See pages 26-30.

Appellees apparently mistake for control what were simply acts of assistance by the Federal Government through its provision of funds, equipment, and training facilities supplied to the state National Guard. However, the fact that the national Government extends financial and other aid to the state governments obviously does not convert the state employees administering the programs into federal employees for the purpose of holding the Federal Government liable for their torts. Any other conclusion would mean that the Federal Government, as a result of its present participation in numerous other grant-in-aid pro-

grams, could be held liable for an unlimited number of claims in staggering amounts. As noted in the *Courtney* dissent, affirmance of the judgment below that caretakers and property officers are federal employees “would open the door of the federal treasury to a great number of claims which Congress never had in mind.” 230 F. 2d 116. For example, it would open the door to federal liability for federal aid granted to the states for:

1. Agricultural research.
2. Cooperative agricultural extension work.
3. Agricultural marketing services.
4. Donations of surplus agricultural commodities.
5. Resident instruction at land-grant colleges.
6. Airport construction.
7. Highways.
8. Civil defense equipment and supplies.
9. Natural disaster relief.
10. School lunches.
11. School construction in federally affected areas.
12. School operation and maintenance in federally affected areas.
13. Vocational education.
14. Public health services.
15. Construction of health facilities.
16. Crippled children's services.
17. Maternal and child health services.
18. Poliomyelitis vaccination.
19. Public assistance.
20. Child welfare services.

21. Vocational rehabilitation.
22. Employment security.
23. Low-rent public housing.
24. Slum clearance and urban renewal.
25. Fish and wildlife restoration and management.
26. State and private forestry cooperation.

The extent of federal participation in the enumerated programs is shown by the fact that *annual* federal payments to the states for these programs average approximately $2\frac{3}{4}$ billion dollars.¹⁰ See *Report of the Commission on Intergovernmental Relations*, 84th Cong., 1st Sess., H. Doc. 198, June 28, 1955, p. 301; *A Description of Twenty-five Federal Grant-in-Aid Programs*, a report submitted to the Commission on Intergovernmental Relations, June 1955, p. 178.

Imposition of far-reaching liability on the Federal Government for subsidizing these vast grant-in-aid projects is a result which cannot be lightly attributed to Congress. Certainly, in light of the absence of any control by the Federal Government over the state employees who carry out these projects, it would at least require express and unequivocal language in the Federal Tort Claims Act to justify imposition of such a drastic liability under the Act. If Congress had intended such a change in the settled law and policy against federal responsibility for financial aid to state projects, it would, we submit, have been more specific. As stated by the Supreme Court in rejecting

¹⁰ Cf. the federal budget for the year ending June 30, 1957, which earmarks 306 million dollars for the Army National Guard and 258 million dollars for the Air National Guard.

for the same reason other claims under the Tort Claims Act, "We cannot impute to Congress such a radical departure from established law in the absence of express congressional command." *Feres v. United States*, 340 U. S. 135, 146.

There is, of course, no express congressional command in the Tort Claims Act on which appellees can rely in seeking to impose liability on the United States for its participation in the National Guard or any other grant-in-aid program. The absence of such an express command, we submit, is fatal to appellees' claims under the Act.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment below should be reversed with instructions to dismiss the complaint filed against the United States.

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No. 15116

In the United States Court of Appeals
for the Ninth Circuit

UNITED STATES, APPELLANT

v.

MAR-LE WENDT AND ALBERT D. ROSELLINI, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

BRIEF FOR APPELLEES

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FILED

SEP 14 1956

PAUL P. O'BRIEN, CLERK

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15116

UNITED STATES, APPELLANT

v.

MAR-LE WENDT AND ALBERT D. ROSELLINI, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

BRIEF FOR APPELLEES

COUNTER STATEMENT

This is an appeal by defendant United States of America from a judgment holding it liable under the Federal Tort Claims Act for personal injuries and property damage sustained by appellees in a collision on the public highway of the State of Washington between a vehicle operated by one of appellees and a truck-trailer owned by the United States and loaned to the Washington National Guard.

The United States truck-trailer was operated by William Brown while performing one of his primary duties as a full time civilian unit materiel caretaker of United States property assigned to Battery C of the 770th AAA Battalion of the Washington National Guard (R. 128, 132). Shortly before the accident Brown

had taken delivery of the truck and trailer at Camp Murray, the Washington National Guard headquarters, and was delivering it to said Battery C in Seattle at the time of the accident (R. 43, 44).

Brown was also a sergeant in Battery C, 770th AAA Battalion. It was found by the court, and no testimony was offered to the contrary, that Brown was at all times herein involved acting in his capacity as a full time civilian materiel caretaker (R. 66).

The admitted facts are that the two and one-half ton truck and four ton trailer were each equipped with electrical brake connections but that the voltage and size of the connections were different and could not be joined without use of a conversion kit which had not been made available to the Washington National Guard by the Department of the Army (R. 45). The court found that these facts were known to Brown and to Lt. Col. Hagen, United States Property and Disbursing Officer at Camp Murray, when Col. Hagen authorized issuance of the truck and trailer to Brown at Camp Murray (R. 67).

The accident occurred when Brown, in attempting to avoid Pacific Telephone and Telegraph Company equipment on the highway, applied the truck brakes, and the truck and unbraked trailer jack-knifed into opposing traffic in the path of appellee's vehicle (R. 91).

Suit was filed under the Federal Tort Claims Act

against the United States. A separate suit was filed by appellees against Pacific Telephone & Telegraph Company for negligence in failing to post adequate warnings of their equipment in the highway. The two cases were consolidated for trial.

Appellees' claim of negligence against the United States, insofar as this appeal are concerned, were: that Brown was the agent, servant and employee of the United States, acting within the scope and course of his employment and that Brown was negligent in operating the truck and trailer without brake connections between them; that the United States was negligent in furnishing to and permitting the operation on the public highways of the State of Washington, of the truck and trailer without brake connections between them. (R. 48).

The United States, in answering, denied that Brown was negligent and denied that he was a federal employee (R. 10). For affirmative defense the answer asserted that Brown was an employee of the State of Washington Military Department and that there could therefore be no recovery against the United States under the Federal Tort Claims Act (R. 12-13).

After trial the court held: that Brown was at all times the agent, servant and employee of the United States acting within the scope of his office and employment as unit materiel caretaker; that Brown was negligent in operating the truck and trailer on the public highways of the State of Washington without

brake connections to the trailer that could be applied from the cab of the truck; that Col. Hagen was at all times the agent, servant and employee of the United States, acting within the scope of his office and employment as United States Property and Fiscal Officer in authorizing issuance to Brown of the truck and trailer, knowing that they would be operated on the public highways of the State of Washington and knowing that said operation was illegal (R. 66, 67). The court found Pacific Telephone & Telegraph Company not negligent and entered judgment against the United States in the sum of \$56,404.75 for Mrs. Wendt and \$1,392.33 for Mr. Rosellini (R. 71).

QUESTION PRESENTED

Whether (1) a full time civilian unit materiel caretaker of United States property loaned to the Washington National Guard is an employee of the United States while acting within the scope of such employment, when such individual is also an enlisted man in the Washington National Guard; and (2) whether a United States Property and Disbursing Officer is, under the facts of this case, an employee of the United States.

STATUTES INVOLVED

The pertinent sections of statutes cited by appellees are as follows:
Title 5, U.S.C.

§ 751. Disability or death of employee—Wilful misconduct—

The United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty, but no compensation shall be paid if the injury or death is caused by the wilful misconduct of the employee or by the employee's intention to bring about the injury or death of himself or of another, or if intoxication of the injured employee is the proximate cause of the injury or death.

Title 28. U.S.C.

§ 1346. United States as defendant

* * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court of the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

§ 2671. Definitions

As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term—

“Federal agency” includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

“Employee of the government” includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity temporarily or permanently in the service of the United States, whether with or without compensation.

“Acting within the scope of his office or employment,” in the case of a member of the military or naval forces of the United States, means acting in line of duty.

Title 32 U.S.C.

§ 4a. National Guard of United States—Establishment—Composition—Officers

The National Guard of the United States is hereby established. It shall be a reserve component of the Army of the United States and shall consist of those federally recognized National Guard units, and organizations, and of the officers, warrant officers, and enlisted members of the National Guard of the several States, Territories, and the District of Columbia, who shall have been appointed, enlisted and appointed, or enlisted, as the case may be, in the National Guard of the United States, as hereinafter provided. * * *

§ 5. Organization of National Guard units.

Except as otherwise specifically provided herein, the organization of the National Guard, including the composition of all units thereof, shall be the same as that which is or may hereafter be prescribed for the Regular Army, subject in time of peace to such general exceptions as may be authorized by the Secretary of War. And the President may prescribe the particular unit or units, as to branch or arm of service, to be maintained in each State, Territory, or the District of Columbia in order to secure a force which, when combined, shall form complete higher tactical units: Provided, That no change in allotment, branch, or arm of units or organizations wholly within a single State will be made without the approval of the governor of the State concerned.

§ 13. Annual reports by adjutants general of States.

The adjutants general of the States, Territories, and the District of Columbia and the officers of the National Guard, shall make such returns and reports to the Secretary of War, or to such officers as he may designate, at such times and in such form as the Secretary of War may from time to time prescribe.

§ 15. Inspections of National Guard.

The Secretary of War shall cause an inspection to be made at least once each year by inspectors general, and if necessary by other officers, of the Regular Army, detailed by him for that purpose, to determine whether the amount and condition of the property in hands of the National Guard is satisfactory: whether the National Guard is organized as hereinbefore prescribed: whether the officers and enlisted men possess the physical and other qualifications prescribed; whether the organization and the officers and enlisted men thereof are sufficiently armed, uniformed, equipped, and being trained and instructed for active duty in the field or coast defense, and whether the records are being kept in accordance with the requirements of this Act (this title). The reports of such inspections shall serve as the basis for deciding as to the issue to and retention by the National Guard of the military property provided for by this title, and for determining what organizations and individuals shall be considered as constituting parts of the National Guard within the meaning of this Act (this title).

§ 17. Rules and regulations.

The President shall make all necessary rules and regulations and issue such orders as may be necessary for the thorough organization, discipline, and government of the militia provided for in this Act (this title).

§ 18. Appointment of officers in National Guard of United States.

Appointments in the National Guard of the United States in

grades below that of brigadier general shall be made by the President alone, and general officers by and with the advice and consent of the Senate.

§ 18a. Form of commission—Officers in National Guard.

All persons appointed in the National Guard of the United States are reserve officers and shall be commissioned in the Army of the United States.

§ 21. Annual appropriation.

A sum of money shall be appropriated annually, to be paid out of any money in the Treasury not otherwise appropriated, for the support of the National Guard, including the expense of providing arms, ordnance stores, quartermaster stores, and camp equipage, and all other military supplies for issue to the National Guard, and such other expenses pertaining to said guard as are or may be authorized by law.

§ 31. Type of arms, equipment, and uniforms of National Guard.

The National Guard shall, as far as practicable, be uniformed, armed, and equipped with the same type of uniforms, arms, and equipments as are or shall be provided for the Regular Army.

§ 33. Issue of arms to National Guard.

The Secretary of War is hereby authorized to procure, under such regulations as the President may prescribe, by purchase or manufacture, within the limits of available appropriations made by Congress, and to issue from time to time to the National Guard, upon requisition of the governors of the several States and Territories or the commanding general of the National Guard of the District of Columbia, such number of United States service arms, with all accessories, Field Artillery, materiel, Engineer, Coast Artillery, Signal and Sanitary materiel, accouterments, field uniforms, clothing, equipage, publications, and military stores of all kinds, including public animals, as are necessary to arm, uniform, and equip for field service the National Guard in the several States, Territories, and the District of Columbia: * * *.

§ 42. Care of government animals—Caretakers of animals, armament and equipment—Compensation

Funds allotted by the Secretary of War for the support of the National Guard shall be available for the purchase and issue of forage, bedding, shoeing, and veterinary services and supplies for the Government animals issued to any organization, and for animals owned or hired by any State, Territory, District of Columbia, or National Guard organization, not exceeding the number of animals authorized by Federal law for such organization and used solely for military purposes, and for the compensation of competent help for the care of materiel, animals, armament, and

equipment of organizations of all kinds, under such regulations as the Secretary of War may prescribe.

The compensation paid to caretakers who belong to the National Guard, as herein authorized, shall be in addition to any compensation authorized for members of the National Guard under any of the provisions of the National Defense Act (this title).

Under such regulations as the Secretary of War shall prescribe, the material, animals, armament, and equipment, or any part thereof, of the National Guard of any State, Territory, or the District of Columbia or organizations thereof, may be put into a common pool for care, maintenance, and storage; and the employment of caretakers therefor, not to exceed fifteen for any one pool, is hereby authorized.

Commissioned officers of the National Guard shall not be employed as caretakers except that, under such regulations as the Secretary of War shall prescribe, one such officer not above the grade of captain for each heavier-than-air squadron, and one such officer not above the grade of captain for each pool, may be employed. Either enlisted men or civilians may be employed as caretakers, but if there are as many as two caretakers in any unit, one of them shall be an enlisted man.

Funds hereafter appropriated under the provisions of the National Defense Act (this title), as amended, for the support of the National Guard of the several States, Territories, and the District of Columbia, shall be supplemental to moneys appropriated by the several States, Territories, and the District of Columbia, for the support of the National Guard, and shall be available for the hire of caretakers and clerks: *Provided*, That the Secretary of War shall, by regulations, fix the salaries of all caretakers and clerks hereby authorized to be employed, and shall also designate by whom they shall be employed.

§ 49. Property and disbursing officers.

The governor of each State and Territory and the commanding general of the National Guard of the District of Columbia shall appoint, designate, or detail, subject to the approval of the Secretary of War, the Adjutant General or an officer of the National Guard of the State, Territory, or District of Columbia, who shall be regarded as property and disbursing officer of the United States. He shall receipt and account for all funds and property belonging to the United States in possession of the National Guard of his State, Territory, or District and shall make such returns and reports concerning the same as may be required by the Secretary of War. The Secretary of War is authorized, on the requisition of the governor of a State or Territory or the commanding general of the National Guard of the District of Columbia, to pay to the property and disbursing officer thereof so

much of its allotment out of the annual appropriation for the support of the National Guard as shall, in the judgment of the Secretary of War, be necessary for the purposes enumerated therein. He shall render, through the War Department, such accounts of Federal funds intrusted to him for disbursement as may be required by the Treasury Department. Before entering upon the performance of his duties as property and disbursing officer he shall be required to give good and sufficient bond to the United States, the amount thereof to be determined by the Secretary of War, for the faithful performance of his duties and for the safekeeping and proper disposition of the Federal property and funds intrusted to his care. He shall, after having qualified as property and disbursing officer, receive pay for his services at a rate to be fixed by the Secretary of War, and such compensation shall be a charge against the whole sum annually appropriated for the support of the National Guard: Provided, That when traveling in the performance of his official duties under orders issued by the proper authorities he shall be reimbursed for his actual necessary traveling expenses, the sum to be made a charge against the allotment of the State, Territory, or District of Columbia: Provided further, That the Secretary of War shall cause an inspection of the accounts and records of the property and disbursing officer to be made by an inspector general of the Army at least once each year: and provided further, That the Secretary of War is empowered to make all rules and regulations necessary to carry into effect the provisions of this section.

§ 61. System of discipline.

The discipline (which includes training) of the National Guard shall conform to the system which is or may be prescribed for the Regular Army, and the training shall be carried out by the several States, Territories, and the District of Columbia so as to conform to the provisions of this Act (this title).

§ 66. Assignment of officers and men of Regular Army for instruction of National Guard.

For duty in the National Guard Bureau and for instruction of the National Guard the President shall assign such number of officers of the Regular Army as he may deem necessary; also, such number of enlisted men of the Regular Army for duty in the instruction of the National Guard.

NGR 75-16 § 2.

"National Guard civilian personnel referred to in these regulations are employees authorized under the provisions of Section 90, National Defense Act, for administrative and accounting duties, maintenance, repair and inspection of materiel, armaments, vehicles, and equipment provided for the National Guard

and used solely for military purposes. The Secretary of the Army has delegated to the Adjutants General of the several states, territories, Puerto Rico, and the District of Columbia, the authority to employ, fix rates of pay, establish duties and work hours (a minimum of 40 hours per week), supervise, and discharge employees within the purview of these regulations; subject to the provisions of law and such instructions as may be from time to time be issued by the Chief, National Guard Bureau."

SUMMARY OF ARGUMENT

(1) A member of a federally recognized State National Guard unit which has not been called into active federal service is not an employee of the United States merely by virtue of his membership in the state National Guard.

(2) A full time civilian materiel caretaker of United States property loaned to a state National Guard, who is also a member of a state National Guard unit, is either an employee solely of the United States or, under the theory of "dual mastership," is an employee of both the state and the United States, even with respect to the same act, when in the performance of his duties as a civilian unit materiel caretaker.

(a) The United States has sufficient right to control the civilian unit materiel caretaker to establish the master-servant relationship between them.

(b) If the state does exercise any control over the unit materiel caretaker, such control is delegated to the state from the Secretary of the Army and the federal government, and is not exercised independently by the state.

(3) The United States Property and Disbursing Officer is a federal employee, the ultimate authority for his appointment resting with the Secretary of the Army. While the United States Property and Disbursing Officer is not entirely on an equal basis with an officer of the Regular Army on active duty, he is nevertheless an employee of the United States whose duties principally consist of accounting for military materiel loaned to state National Guard units. The theory of dual mastership may here again reconcile what to the appellant appears to be an irreconcilable conflict.

(4) Holding that the civilian unit material caretaker and United States Property and Disbursing officer are employees of the United States within the meaning of the Federal Tort Claims Act in this case does not open the door to federal liability for its many grant-in-aid programs.

I.

The United States possesses the requisite right to control unit materiel caretakers, and, as a consequence, is responsible for their negligent acts.

The position of "unit materiel caretaker" does not exist independently of federal legislation. It is purely the creature of federal statute, 32 USC 42. In addition to creating the position, the aforesaid statute provides that the caretakers who are hired shall be compensated under such regulations as the Secretary of the Army shall prescribe, such compensation to be

paid out of federal funds, and in addition to any compensation paid for regular drill and training. This significant proviso is also found in the statute:

“The Secretary of the Army shall, by regulations, fix the salaries of all caretakers and clerks hereby authorized to be employed, and shall also designate by whom they shall be employed.”

Pursuant to the aforesaid statute, the National Guard Regulations 75-16 was promulgated on January 7, 1953. Section 2 of this regulation provides:

“National Guard civilian personnel referred to in these regulations are employees authorized under the provisions of Section 90, National Defense Act, for administration and accounting duties, maintenance, repair and inspection of materiel, armaments, vehicles, and equipment provided for the National Guard and used solely for military purposes. The Secretary of the Army has delegated to the Adjutants General of the several states, territories, Puerto Rico, and the District of Columbia, the authority to employ, fix rates of pay, establish duties and work hours (a minimum of 40 hours per week), supervise, and discharge employees within the purview of these regulations; subject to the provisions of law and such instructions as may be from time to time be issued by the Chief, National Guard Bureau.”

The regulations further define various classes of workers, establish the number to be employed, set qualifications for the various classes, provide for appointment

of workers and a place for their employment, set pay scales and other working conditions. These civilians, when employed, are required to execute standard federal "loyalty oath." They are paid from federal funds budgeted for aid to the National Guard by warrants drawn upon the Treasury of the United States. This property is assigned to the National Guard but remains the property of the United States, 32 USC 33.

Statutory control over the federally recognized National Guard units is exercised in several ways, but the following statutes are illustrative of both the method and extent of that control:

32 USC Section 13: The Adjutants General of the States, Territories and the District of Columbia and the officers of the National Guard, shall make such returns and reports to the Secretary of War, or to such officers as he may designate, at such times and in such form as the Secretary of War may from time to time prescribe.

32 USC Section 15: The Secretary of War shall cause an inspection to be made at least once each year by inspectors general, and if necessary by other officers of the Regular Army, detailed by him for that purpose, to determine whether the amount and condition of the property in hands of the National Guard is satisfactory; whether the National Guard is organized as hereinbefore prescribed; whether the officers and enlisted men possess the physical and other qualifications prescribed; whether the organization and the officers and enlisted men

thereof are sufficiently armed, uniformed, equipped and being trained and instructed for active duty in the field of coast defense. . . .”

Paragraphs (12) and (13) of Section 13, SR 20-10-8 sets up the requirements that the Inspector General upon making his Armory inspection shall ascertain that the unit materiel caretaker has proved himself qualified for the job, that he work the required number of hours, that his federal pay is within the prescribed limits, and that other duties assigned to him (presumably as a member of the National Guard) do not interfere with his “primary duties” (those of unit materiel caretaker).

In view of the foregoing, it would seem to be legalistic in the extreme to take the position that a position created by federal statute, circumscribed and defined by federal regulations, and paid for out of federal funds, does not, in some way, involve the United States as more than an interested onlooker. It seems appropriate to appellees to suggest what they deem to be a “common sense” approach to the question, which substantially is that the United States created the position and paid its holder because it derives some benefit from his duties. The very notion of a “caretaker” suggests a benefit to the owner of the property in his care—in this case the United States. It would seem manifest in view of the statutes cited hereinabove, that any control over the unit materiel caretaker which is exercised by the Adjutant General of the State or Territory is done purely in a representative capacity

as an agent for the Secretary of the Army, who has plenary power to prescribe regulations for the position.

The State of Washington National Guard hires approximately 65 civilian employees who are entirely separate from the unit materiel caretakers. These 65 employees are considered strictly State employees and General Stevens' testimony made a clear distinction between them and the civilian unit materiel caretakers, further emphasizing the master-servant relationship between the United States and the materiel caretakers (R. 142, 143).

Appellant takes the position that if any control over the unit materiel caretaker is exercised by the state Adjutant General, then that, in itself, must necessarily preclude any control at all being exercised over him by the United States. Appellees contend that a dual mastership relation is well known in the law, and that even if it be conceded that the State of Washington exercises some measure of control over the unit materiel caretaker in question, nevertheless such control, if any, was not incompatible with the control already exercised over the caretaker by the United States as above mentioned.

The duality of the mastership which may exist at various times between the unit materiel caretaker and the state and federal government, respectively, is emphasized by the very statute which creates the position, 32 USC 42:

“ . . . Either enlisted men or civilians may be employed as caretakers, but if there are as many as two caretakers in any unit, one of them shall be an enlisted man.”

Clearly, Congress in creating the position of unit materiel caretaker contemplated that it would be filled, in some instances, at least, by civilian personnel who had no connection whatever with the State of Washington, but were simply hired by the federal government for the purpose of protecting its equipment which had been loaned to the particular state.

As was pointed out in *United States v. Elmo*, 197 F. 2d 230 (C.A. 5), the United States clearly recognizes the duality of the mastership between the unit materiel caretaker and the federal and state governments where death or disability occurs to a caretaker in the performance of duty. If disability occurs during National Guard training, the caretaker, if he happens to be a member of the National Guard, is entitled to the disability benefits available to members of the Armed Forces. On the other hand, if the unit materiel caretaker is injured during the course of his civilian employment, he is entitled to receive all the death and disability benefits of other civilian employees of the United States, under the United States Employees Compensation Act of September 7, 1916, as amended, 5 USC 751, et seq. The record clearly sets this out (R. 117, 137, 163).

Restatement of Agency, Section 226. “A person may be the servant of two masters not joint

employers at one time as to one act, provided that the service to one does not involve abandonment of service to the other.”

The precise factual situation was presented in *Courtney v. United States*, 230 F. 2d 112 (C.A. 2), wherein the court stated:

“But we need not decide whether or not Truex is an ‘employee’ of the State of New York. Whether he was an ‘employee of the Government’ is wholly a federal question based upon federal statutory interpretation. 28 USC § 1346 (b), 2671. Consequently his status under New York law is irrelevant. Moreover, we know of no rule of law that service to federal and state government is incompatible, or that one cannot be an employee for some and not for all purposes.”

The *Courtney* case explicitly states the principle of “dual-mastership” which is implicit in the other cases which have determined the liability of the United States for the acts of a National Guard unit materiel caretaker committed within the scope of his employment. As is conceded by appellant, all of these cases have held the United States liable, since, appellees contend, any other ruling would stultify the Act of Congress which created the position. The cases upon which appellees rely, and which support their position, are:

United States v. Holly, 192 F. 2d 221 (C.A. 10);
United States v. Elmo, 197 F. 2d 230 (C.A. 5);

United States v. Duncan, 197 F. 2d 233 (C.A. 5) ;
O'Toole v. United States, 206 F. 2d 912 (C.A. 3) ;
Courtney v. United States, 230 F. 2d 112 (C.A. 2)
Watt v. United States, 123 F. Supp. 906 (D.C.
Ark) ;

Appellant's objection to the reasoning of the *Holly* case is that it "seems instead to be grounded upon the fact that caretakers are paid from federal funds." (P. 33 Appellant's Brief). Appellees submit that upon closer analysis the reasoning of the *Holly* case is not solely to the effect that it would be unlikely that the United States would pay for services which did not benefit it, but rather, is based upon the broader ground that the federal government, in fact, had the right to control the physical activities of the unit materiel caretaker :

"The federal government maintains a reasonable measure of direction and control over the method and means of a caretaker's performing his service. There is present every element necessary to constitute a unit caretaker an employee of the United States. The fact that under the regulations the caretaker must be a member of the National Guard and perform duties for the State is immaterial. The injuries were caused while the caretaker was in the performance of his duties for the United States, not the state."

Briefly, the court's holding that the United States possessed a reasonable measure of control over the physical activities of the unit materiel caretaker in question was based upon the fact that the United States,

through its regulations, issued by the National Guard Bureau, prescribed the pay scale for the position, general working conditions, and in detail, the right of caretakers to annual leave, sick leave and military leave, including accumulation of annual sick leave. Naturally, the fact that caretakers are authorized to be paid only on standard forms designated by the National Guard Bureau and by funds drawn on the Treasury of the United States, was not without some weight.

This view is given added weight by the testimony of General Stevens, Adjutant General of the State of Washington, when he testified, in effect, that his authority over unit materiel caretakers stemmed from his capacity as an officer of the Army of the United States by virtue of authority delegated to him through federal orders, rather than from his capacity as an officer of the State of Washington National Guard (R. 143, 144).

In brief summary, it is appellees' contention that it is immaterial whether the State of Washington had any right to control the activities of the unit materiel caretaker in question, inasmuch as any such right was by virtue of a delegation of authority from the Secretary of the Army, or, at the very least, was not incompatible with the right to control which at all times existed in the National Guard Bureau, the Secretary of the Army, and the United States Defense Establishment.

Lt. Col. Hagen, the United States Property and Disbursing Officer, under the facts of this case, is a federal employee within the meaning of the Federal Tort Claims Act.

Appellant tacitly conceded its right to control this officer at the inception of the trial by an order, later rescinded, from the Judge Advocate General's Department of the United States Army, ordering him not to testify (R. 64).

The Colonel conceded that he was on duty as an officer of the United States Army, and not as a colonel of the Washington National Guard (R. 187). General Stevens testified that Col. Hagen was on active federal duty, since he was a full time employee of the National Guard Bureau, an integral part of the department of the Army set up to supervise the State National Guards (R. 142) This was likewise recognized by the court (R. 191, 192).

It should be emphasized that appellant has not in any way questioned the negligence of the issuance by the United States to Battery C of the 770th AAA Battalion of a truck and trailer for use on the highways of the state knowing them to be in a defective and unfit condition for such operation. The United States Property and Disbursing Officer is the last federal link in the chain whereby United States equipment is given to the particular state National Guard Battery that is designated to get that equipment by the Table of Organization & Equipment established by the Department of Army.

The position of United States Property and Disbursing Officer is authorized by federal statute, 32 UCS 49. The statute provides, essentially, for the designation of qualified National Guard personnel to be detailed by the Secretary of the Army for this type of duty, and provides that after designation and confirmation by the Secretary of War, the appointee shall be the property and disbursing officer of the United States. He is required to receipt and account for all funds and property belonging to the United States in possession of the National Guard of his state, is required to make detailed returns and reports to the Secretary of the Army, give good and sufficient bond to the United States prior to entering upon his duties, conditioned on the faithful performance thereof, receive pay at a rate to be fixed by the Secretary of the Army, and be reimbursed for travelling expenses out of federal funds. The status of an appointee under the aforesaid statute has been determined in a criminal case, where any doubt as to his non-federal status would, naturally, have been resolved in favor of the defendant. The court in *Woodford v. United States*, 77 F. 2d 861 (C.A. 8), stated, in part, as follows:

“The indictment described appellant as ‘an officer of the United States, to-wit, the Property and Disbursing Officer of the United States for Arkansas, duly appointed and acting as such’ under the provisions of this act of Congress. This argument of counsel is directed mainly to their contention that the appointment is by the governor of the state, and, therefore, not by the

head of a department of the government as required by constitutional mandate. The meaning conveyed by the language of the act is clear and unambiguous. The governors of the states merely designate or detail the officers of the National Guard for the consideration of the Secretary of War as proposed Property and Disbursing Officers of the United States, to administer allotments out of the annual appropriation made by the government for the support of the National Guard of the several states. When the persons so designated are approved by the Secretary of War, they become such officers of the United States within the meaning of Section 2 of Article II of the Constitution. The indictment alleges that the appellant was duly so appointed and so acted. The Secretary of War is the head of a department of government; expressly authorized by Act of Congress. Approval of an appointment, designation or detail, made by the governor is equivalent to a direct appointment by the Secretary himself."

The possible dual nature of the function of the United States Property & Disbursing Officer has led to some apparently conflicting decisions. It is probably similar to the status of General Stevens, who testified to his dual status by virtue of his capacity as an officer in the Army of the United States and as Adjutant General of the State of Washington (R. 143).

On the facts of the instant case, the law would appear to be well settled that Col. Hagen was an officer and employee of the United States at the time of commission of his negligent act.

II.

The historical development of the National Guard as a state organization is not inconsistent with the master-servant relationship with the United States asserted by appellees.

Point II of appellant's brief (page 26) proceeds on the premise that no officer or enlisted man of the reserve component can be an employee of the United States when not on active duty and that because the Washington National Guard was not in active federal service there could be no relation of master-servant between the United States and any individual connected in any way with the Washington National Guard, citing the historical separation between the two as authority.

This argument fails to recognize: (1) that the United States may hire, through delegated authority, full time civilian caretakers to care for and look after property of the United States on loan to the state National Guards during the periods such National Guards are not in active federal service; and (2) that officers of reserve components may be ordered to active duty and detailed for duty with National Guards not in active federal service; and (3) that certain practical modifications have of necessity been engrafted on the traditional "separation," some of which have given rise to the dual employment relationship described by appellees and recognized by the pertinent case authority.

Federal statutes exclusively regulate the National Guard. The National Guard of the United States is

established as a component part of the defense establishment and as a reserve component of the Army of the United States, 32 USC 4 a. The form of organization of National Guard units is prescribed by a federal statute, 32 USC 5. Reports are required of state officials, 32 USC 13. Federal inspections form the basis for allotment of federal funds, 32 USC 15. The President is authorized to make all necessary rules and regulations for the government of the National Guard, 32 USC 17. Appointments of officers in the National Guard below the grade of Brigadier-General are made exclusively by the President, and general officers by and with the advice and consent of the United States Senate, 32 USC 18. All officers so appointed are commissioned as officers of the United States, 32 USC 18 a. An annual appropriation is made for the support of the National Guard, including the provision of arms, ordnance stores, quartermaster stores, and camp equipage, and all other military supplies, 32 USC 21. The National Guard, so far as is practicable, is equipped and armed with the same type of uniforms, arms and equipment as are provided for the Regular Army, 32 USC 31. The discipline of the National Guard is required to conform to the system which is prescribed for the Regular Army, 32 USC 61, and the training is supervised by regular army officers assigned to the task, 32 USC 66.

It would seem manifest, then, that federal control over the National Guard is exercised in several ways, in supervisions and training under the direction of the

army and corps area commanders, in regular army inspections, in regular army instructors, in regulations in the form of "National Guard Regulations, Special Regulations, and National Guard Bureau Circulars." in administration of the Uniform Code of Military Justice, and in "federal recognition." It can scarcely be doubted that the keystone of the entire system of federal control of the National Guard is its control of the "purse strings." by "federal recognition," the Secretary of the Army of the United States has virtually complete control over every single activity of the National Guard as a whole, and of the individual units, Appellees will be the first to concede that the National Guard retains some vestiges of its original status as a state militia force, and is subject to the control of the governor of the state under certain circumstances. Nevertheless, appellees contend that while it is all very well to speak of the National Guard of today as though it were a motley militia force of pre-revolutionary days, such an approach is academic, at best, and gives no heed whatever to the realities of the situation as outlined hereinbefore.

III.

General holdings concerning National Guard personnel, as such, are inapplicable to the present controversy.

Appellant admits that the case authority involving the employment status of civilian unit materiel caretakers clearly supports the judgment of the District Court in this case. They seek, however, to avoid the results in those cases by citations to cases where only

the general status of a member of a state National Guard, as such, were involved. Appellees do not challenge the cases relied upon by appellants to the extent that their holdings are limited to the activities of state National Guardsmen in their capacities as such. On the day of the accident herein involved, Brown did not perform any duty that would be compensated for as drill time as a member of his National Guard battery (R. 137).

The authorities relied upon by appellant as controlling the employment status of Col. Hagen are answered by the testimony in this case, as hereinbefore recited, and by the reasoning in *Woodford v. United States*, 77 F. 2d 861 (C.A. 2). *supra*.

IV.

Appellees deny that Federal support and "recognition" of National Guard units is a grant in aid program, as contended by appellant.

In its fourth argument, appellant contends that "in the absence of a clear and unequivocal declaration of liability in the Federal Tort Claims Act, Congress should not be presumed to have exposed the federal government to tort liability for its participation in the National Guard or any other grant in aid program." This argument makes two assumptions, both of which appellees deny. The first is that federal recognition of a National Guard unit is simply a grant in aid program which, in the words of appellant, can be equated with federal grants for the purpose of providing hot lunches for school children. Suffice it to say, that the

entire problem now before the court concerns the measures which the United States admittedly has taken for the purpose of protecting, safeguarding, and maintaining federally owned arms and equipment loaned to an armed force which is an integral part of the United States Defense Establishment. Appellees feel that it should be obvious that there is a considerable difference between the defense problem of the United States and implications as hereinabove stated, and the maternal and child health services and poliomyelitis vaccination services which appellant asserts are precise parallels.

Appellant's argument further assumes that appellees have contended that the United States is liable under the Federal Tort Claims Act merely because it "participates" in the National Guard program. Appellant misapprehends entirely the position appellees have taken from the outset of this case. Appellees have, and do, contend that Colonel Albert G. Hagen, the United States Property and Disbursing Officer at Camp Murray, Washington, on the 11th day of March, 1953, was a servant and employee of appellant, acting within the scope of his employment as such at the time he issued a certain truck and trailer in the manner more particularly described in the record (R. 186 *et seq.*). Appellees, further, have and do contend that Brown, the unit materiel caretaker, was a servant and employee of the appellant, United States, at the time he received the aforesaid truck and trailer and drove it upon the highways of the State of Washington.

Appellant does not deny that either Colonel Hagen or Sergeant Brown were negligent in their acts.

Appellant's next contention, implicitly at least, is to the effect that the United States should not be held liable in the instant cause since the Federal Tort Claim Act does not expressly state that unit materiel caretakers and United States Property & Disbursing Officers assigned to National Guard units are federal employees, for whose negligence the United States is responsible. Appellees feel that such a position would impose an intolerable burden upon Congress in enacting legislation of that type, and suggests that the judiciary is well able to determine the liability of the parties in the present case.

CONCLUSIONS

For the reasons hereinabove stated, appellees respectfully request that the judgment of the District Court be affirmed.

CASEY & PRUZAN
JACK M. SAWYER
30th Floor, Smith Tower
Seattle 4, Washington

No. 15117

United States
Court of Appeals
for the Ninth Circuit

NEW AND USED AUTO SALES, INC., a Corporation,
Appellant,
vs.

BERNARD L. HANSEN, also known as BARNEY HANSEN, and SUZANNE HANSEN,
Appellees.

Transcript of Record

Appeal from the District Court for the District of Alaska,
Third Division

FILED

OCT - 2 1956

PAUL P. O'BRIEN, CLERK

No. 15117

United States
Court of Appeals
for the Ninth Circuit

NEW AND USED AUTO SALES, INC., a Corporation,
Appellant,
vs.

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Appeal from the District Court for the District of Alaska,
Third Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

BELL, SANDERS & TALLMAN,

Central Building,
Anchorage, Alaska,

Attorneys for Appellant

BURTON C. BISS,

220 Central Building,
Anchorage, Alaska

Attorney for Appellees

In the District Court for the District of Alaska,
Third Division

No. A-11,693

NEW & USED AUTO SALES, INC.,
A Corporation, Plaintiff,
vs.

BERNARD L. HANSEN, a/k/a BARNEY HAN-
SEN, and SUZANNE HANSEN,
Defendants.

COMPLAINT

The plaintiff complains of the defendants and for cause of action alleges:

I.

That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the Territory of Alaska, with its principal place of business at Anchorage, Alaska, and that it has paid its annual corporation tax last due and has filed its annual report for the last calendar or fiscal year for which such report became due for filing.

II.

That on the 31st day of December, 1954, the defendants made and entered into a Conditional Sale Contract with the plaintiffs for the purchase of one (1) 1955 Pontiac automobile bearing motor no. K755H82118, and serial no. K755H82118; a copy of said Conditional Sale Contract is attached hereto, marked Exhibit "A," and made a part hereof as fully as if set forth herein in full.

III.

That by the terms of said Contract the title to the aforementioned vehicle shall remain in the plaintiffs until after the full and complete payment of the purchase price as stated in said Contract, and that in the event default shall be made in the payment of any installments upon the purchase price the vendor, the plaintiff herein, is entitled to the possession of said vehicle.

IV.

That the defendants have defaulted in the payment of an installment due on the 3rd day of December, 1955, in the amount of One Hundred Twenty Dollars and Eighty-four Cents (\$120.84).

V.

That plaintiff has a special ownership in the above described automobile, and is entitled to the immediate possession of the same; that said automobile is wrongfully detained from plaintiff by said defendants.

VI.

That plaintiff has been damaged in the amount of Fifty Dollars (\$50.00) for the cost of recovering said personal property from defendants.

Wherefore, plaintiff prays for judgment against defendants for the recovery and possession of said automobile, or, in case possession thereof cannot be had, for a judgment against defendants for the value thereof, for damages in the sum of Fifty Dol-

lars (\$50.00), for a reasonable attorney's fee and for the costs herein expended.

BELL, SANDERS & TALLMAN
/s/ By: JAMES K. TALLMAN
Of Attorneys for Plaintiff

Duly Verified.

[Endorsed]: Filed Dec. 9, 1955.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR SUMMARY
JUDGMENT

Please Take Notice that Burton C. Biss, attorney for defendant, will bring the attached Motion for Summary Judgment on for hearing before the above entitled Court at the Federal Building at Anchorage, Alaska, at the hour of 11:00 A.M. on the 23rd day of December, 1955, or as soon thereafter as Counsel can be heard.

Dated at Anchorage, Alaska, this 20th day of December, 1955.

/s/ BURTON C. BISS
Attorney for Defendant

Acknowledgment of Service Attached.

[Endorsed]: Filed December 20, 1955.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Comes now the defendant, by his attorney of record, and moves the Court to enter Judgment for the defendant against the plaintiff in the amount of Six Hundred Seven and 35/100 Dollars (\$607.35), plus interest and attorney's fees, and Order the automobile returned to the defendant.

This Motion is based on all the files and records herein, and particularly upon the affidavits filed with this Motion.

Dated at Anchorage, Alaska, this 20th day of December, 1955.

/s/ BURTON C. BISS

Attorney for Defendant

Acknowledgment of Service Attached.

[Endorsed]: Filed December 20, 1955.

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
Territory of Alaska—ss.

Bernard L. Hansen, being first duly sworn, on oath, deposes and says:

That I am the same Bernard L. Hansen named as a defendant in the above entitled action.

I entered into a contract for the purchase of a 1955 Pontiac automobile with the plaintiffs and had paid Two Thousand Four Hundred Twenty Nine and 40/100 Dollars (\$2,429.40) as of the 2nd day of December, 1955, more than one-half of the total purchase price of the automobile.

I have been recently unemployed and one of my children was, and is, in need of expensive medical treatment including a surgical operation.

Saturday, the 3rd day of December, 1955, I did not have sufficient cash to make the payment on the automobile I was purchasing from the plaintiff. However, being re-employed, I was awaiting my pay check in order to meet this and other obligations.

The plaintiff re-possessed my car without first giving me any warning, on the evening of December 14th, 1955. I went to the bank to attempt to make the delinquent payment, but was there informed that plaintiff had instructed the bank not to accept any further payments.

I had already paid Two Thousand Four Hundred Twenty Nine and 40/100 Dollars (\$2,429.40) on the automobile, and could not afford to lose the investment. I also needed the car to secure work and support my family.

I contacted my attorney who advised me to secure a statement from the plaintiff of the amount due and the expenses incurred in the repossession, so that I could make the payment to the plaintiff and recover the automobile.

I wrote a request as follows: "December 16, 1955 New and Used Auto, I want a written statement of

the amount you say is due under the contract and what you claim as your expenses for retaking the car and keeping and storing it. /s/ Barney Hansen”.

On or about 2:55 P.M. on the 16th day of December, 1955, I personally delivered to Art Kifer, an employee and salesman of New and Used Auto Sales, Inc., in charge of their office at 4th and A, Anchorage, Alaska, the above quoted request. Mr. Kifer apparently called Mr. Bollen, who signed the complaint, on the telephone and was informed that Mr. Bollen would return to the office in a few minutes. I waited approximately twenty minutes to speak to Mr. Bollen but he did not appear. I left the copy of my request at plaintiff's office and left.

I returned to the plaintiff's office again about 4:30 P.M. the same day and found Hallie F. Bollen there. Mr. Bollen was seated at his desk in the front office of the New and Used Auto Sales, Inc., at 4th and A. Streets. I had made an extra copy of my request and I presented it to him and waited while he read it. He refused to make a written acknowledgment of receipt.

Mr. Bollen orally stated that the amount owing was the entire remaining balance of the total purchase price but he said that any written statement would have to be prepared by his attorney.

I asked him if I could stop by the office at 1:00 P.M. Saturday, the 17th day of December, 1955, and pick up the written statement. He said that I could do that, and I requested that if he couldn't be there himself at that time, to be sure and leave

the statement with someone so I could pick it up.

I stopped by plaintiff's office at 1:00 P.M. on Saturday, the 17th day of December, 1955 and was told by Art Kifer that Mr. Bollen was not there and if I wanted to see him I would have to stop by later since he would be "in and out" all afternoon.

I left, and subsequently called plaintiff's office by telephone and found out that Mr. Bollen was in. I returned again to plaintiff's office at about 4:30 P.M. on Saturday the 17th day of December and Mr. Bollen showed me a statement of the amount due, a copy of which is attached to this affidavit. At his request, I signed a copy of plaintiff's statement to show that I had received it.

My attorney had told me that I would only have to pay the delinquent amount on the contract and the reasonable expenses of retaking the vehicle. I did not have One Thousand Six Hundred Ninety Three Dollars Thirty Nine Cents (\$1,693.39) in cash, so I could not pay what was requested in the plaintiff's statement. This was the first time anyone said that plaintiff had elected to declare the entire principal sum remaining unpaid to be due and payable.

I called my attorney, and he informed me that he would talk to me Monday, December 19, 1955. On Monday, my attorney advised me to tender to Mr. Bollen on behalf of myself and my wife the delinquent contract payment plus Five Dollars (\$5.00) for storage to December 19, plus Nine Dollars and Sixty Cents (\$9.60) for Marshal's fees in claim and delivery action. My attorney advised me

to tender this money to the plaintiff and instruct them to turn my car over to me. He further instructed me that if plaintiff refused to accept the money and turn the car over to me, that I should then tender to the plaintiff the delinquent payment plus all of the other expenses items listed in plaintiff's statement. My attorney advised me that if plaintiff still would not accept the money, then I should tender to plaintiff Two Hundred Fifteen Dollars (\$215.00) which would be more than the delinquent payment plus all of the expenses claimed.

Since I had more than Two Hundred Fifteen Dollars (\$215.00), and since I need the car for transportation, I attempted to locate Mr. Bollen to give him the money.

I asked Mrs. Blanche Avila to accompany me, and together we went to plaintiff's office. We were informed that Mr. Bollen was at the office of Bell, Sanders and Tallman, and we went there to make the payment.

I offered Mr. Bollen One Hundred Thirty Five Dollars and Thirty Two Cents (\$135.32), and made the tender by laying the cash on the desk in front of him. Mr. Bollen then talked to Mr. Tallman, and orally informed me that the delinquent payment and his costs of retaking, keeping and storing the car totaled Two Hundred Seven Dollars and Forty Four Cents (\$207.44). We were asked to step outside Mr. Tallman's office while he talked to Mr. Bollen, and I picked up the money and Mrs. Avila and myself waited outside Mr. Tallman's office.

After a few minutes, we were called back into

the office and were told by Mr. Tallman in Mr. Bollen's presence that the car would be returned to me if I paid Two Hundred Seven Dollars and Forty Four Cents (\$207.44), plus Two Hundred Twenty Five Dollars (\$225.00) which Mr. Bollen claims I owe him, plus Fifty Dollars (\$50.00) toward his attorney's fees. Although I need the car, I did not have Four Hundred Eighty Two Dollars and Forty Four Cents (\$482.44) in cash. Mr. Bollen said that he would return the car to me if I would pay Four Hundred Eighty Two Dollars and Forty Four Cents (\$482.44) in cash, or else I must pay the balance in full on the contract.

I then told Mr. Bollen that I would only pay the delinquent contract payment plus the actual costs of the repossession and I tendered to him Two Hundred Seven Dollars and Forty Four Cents (\$207.44). He refused to accept the cash and I thereupon left the office.

/s/ BERNARD L. HANSEN

Subscribed and Sworn to me before this 20th day of December, 1955.

[Seal] /s/ GERALDINE THOMPSON
Notary Public in and for Alaska. My Commission
Expires May 16, 1959.

[Title of District Court and Cause.]

To Bernard L. Hansen, a/k/a Barney Hansen, and
Suzanne Hansen:

Please Take Notice that in accordance with that

certain paragraph of the Conditional Sale Contract entered into on the 31st day of December, 1954, by and between you and New and Used Auto Sales, Inc., which said paragraph reads as follows:

“In the event of default in the payment of any of the said installments when due as hereinabove provided, time being of the essence hereof, the holder of this note may without notice or demand declare the entire principal sum then unpaid immediately due and payable.”

The plaintiff in the above entitled action has elected to declare the entire principal sum remaining unpaid on your Conditional Sale Contract due and payable and the following is a statement of the sum due under the contract and the expense of retaking, keeping and storage:

Net payoff of principal sum as of December 19, 1955	\$1,611.79
Cost of undertaking by Continental Casualty Company	40.00
Cost of storage to December 19.....	5.00
Cost of filing suit.....	27.00
Marshal's fees in claim and delivery action	9.60
<hr/>	
Total	\$1,693.39

NEW AND USED AUTO SALES,
INC.

By /s/ HALLIE F. BOLLEN
President

Acknowledgment of Service Attached.

[Endorsed]: Filed December 20, 1955.

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
Territory of Alaska—ss.

Blanche Avila, being first duly sworn, on oath, deposes and says:

Bernard L. Hansen, the defendant in the above entitled action, requested that I accompany him to act as a witness while he made a delinquent payment on his car to New and Used Auto Sales, Inc.

On the 19th day of December, 1955, at about 5:00 P.M., I accompanied Mr. Hansen to the law offices of Bell, Sanders and Tallman and was introduced to Mr. Tallman and Mr. Bollen.

I observed Mr. Hansen place One Hundred Thirty Five Dollars and Thirty Two Cents (\$135.32) upon the desk in front of Mr. Bollen and heard him say that he was tendering the payment on his car. Mr. Bollen did not accept the money and I heard him tell Mr. Hansen that counting all of the expenses the amount should be Two Hundred Seven Dollars and Forty Four Cents (\$207.44). No one gave Mr. Hansen a written statements of the expenses, but that is what Mr. Bollen said orally.

I was asked to leave the office with Mr. Hansen and we waited a few moments outside. Subsequently, we were called back into the office and I observed Mr. Hansen tender Two Hundred Seven Dollars and Forty Four Cents (\$207.44) to Mr. Bollen. Mr. Bollen refused to accept the money, and

stated that he would not return the car to Mr. Hansen unless Mr. Hansen paid off the remaining balance in full on the contract or else paid the expenses of the repossession plus Fifty Dollars (\$50.00) attorney's fees, plus Two Hundred Twenty Five Dollars (\$225.00).

/s/ BLANCHE AVILA

Subscribed and Sworn to before me this 20th day of December, 1955.

[Seal] GERALDINE THOMPSON,
Notary Public in and for Alaska. My commission
expires 5-16-59.

Acknowledgment of Service Attached.

[Endorsed]: Filed December 20, 1955.

[Title of District Court and Cause.]

AFFIDAVIT

United States of America
Territory of Alaska—ss:

Hallie F. Bollen, being first duly sworn, on oath deposes and states:

That he is the President of New and Used Auto Sales, Inc., the above named plaintiff, and is answering the affidavits of the defendants and motion for summary judgment as follows:

Affiant admits that he entered into a contract for the purchase of a 1955 Pontiac automobile with the

above named defendant, and affiant admits repossessing the said automobile after the default of a payment through the claim and delivery action herein.

Affiant states that within a reasonable time after receiving a request of a statement of the amount due under the contract and of the expenses for re-taking, keeping and storing of the car, said statement was furnished to defendant above named, but that at no time did the defendants ever offer to pay the amount indicated in said statement; affiant admits that the defendant, Bernard Hansen, tendered certain payments as indicated in his affidavit of December 20, 1955, on file herein, but affiant denies that the amounts tendered were sufficient to pay the amounts required under the terms of the contract.

Affiant further states that he has had great difficulty with this particular defendant upon the conditional sale contract involved herein and that he has at the present time another suit pending against this defendant for the collection of a bad check in the amount of \$225.00, which said check was given as part of the down-payment upon the vehicle involved herein.

Affiant states that this is the third time that it has become necessary to repossess the automobile under this conditional sale contract and that in the two previous repossessions, the defendant acquired the possession of the vehicle from the plaintiff through illegal means; in the first repossession, some time during the month of August, 1955, the defend-

ant gave plaintiff a bad check in the amount of \$225.00 plus some cash, which enabled defendant to pick up a previous bad check in the amount of more than \$300.00. However, the second check in the amount of \$225.00 was also bad and the plaintiff has been unable to collect on said check to date. Subsequent to the first repossession and the return of the automobile to defendants, the defendants defaulted again upon their payments under the conditional sale contract and affiant peacefully repossessed said vehicle and parked said vehicle upon the parking lot of plaintiff. But shortly after getting said vehicle parked on the property of the plaintiff and while affiant was away or not available to prevent such actions, the defendant Bernard L. Hansen sneaked into the lot of New and Used Auto Sales, Inc., and illegally took possession of the vehicle, driving same off with a set of keys which the defendant had in his possession. Following such illegal retaking of said vehicle by the defendant, affiant personally went out with two employees to repossess the vehicle again, but affiant and his employees were prevented from doing so by the defendant who was brandishing a gun. Subsequent to this transaction affiant, on advice of counsel informed him that if he could not get peaceable possession of the vehicle involved in here that it was necessary to bring a claim and delivery action, did bring said action.

Affiant further states that the \$225.00, mentioned in defendant's affidavit, is the sum due plaintiff upon the aforementioned "hot check"; that a suit

was brought in the Commissioner's Court upon said check and said action is now pending in the District Court, under docket number 11,713; that said \$225.00 was part of the down-payment upon the vehicle involved herein and that said check was given in part payment of a previous bad check upon the down-payment.

Further affiant sayeth not.

/s/ HALLIE F. BOLLEN.

Subscribed and sworn to before me, this 21st day of December, 1955.

[Seal] /s/ JAMES K. TALLMAN,
Notary Public in and for Alaska. My Commission
Expires November 26, 1958.

Acknowledgment of Service Attached.

[Endorsed]: Filed December 21, 1955.

[Title of District Court and Cause.]

STATEMENT

To Bernard L. Hansen, a/k/a Barney Hansen, and
Suzanne Hansen, and their attorney, Burton
Biss:

Please take notice that the following is a statement of the amount in default under your conditional sale contract entered into on the 31st day of December, 1954, by and between you and New and Used Auto Sales, Inc., and of the costs of retaking, keeping and storage:

Delinquent installment due Dec. 3, 1955....	\$120.84
Late charge on delinquent installment.....	6.04
Cost of undertaking by Continental Casualty Co.	40.00
Cost of storage.....	5.00
Cost of filing suit.....	27.00
Marshal's fee in claim and delivery action..	15.80
<hr/>	
Total.....	\$214.68

You are further notified that upon payment of the above indicated sum, the vehicle retaken by plaintiff will be released to you pending the final determination of the case herein.

NEW AND USED AUTO SALES,
INC., Plaintiff,

/s/ By JAMES K. TALLMAN,
Attorney for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed December 24, 1955.

[Title of District Court and Cause.]

AFFIDAVIT

United States of America
Territory of Alaska—ss:

Hallie F. Bollen, being first duly sworn deposes and states:

That he is the President of the above named plaintiff corporation; that he is over the age of

twenty-one (21) years of age and is competent to be a witness as to all matters herein.

That the plaintiff is the owner of the property claimed in this action described as: one (1) 1955 Pontiac Chieftain Sedan bearing motor No. K755H82118 and serial No. K755H82118 and plaintiff is lawfully entitled to the possession thereof.

That said property is wrongfully detained by the defendants.

That said defendants allegedly withholds and detains possession of said property, according to affiant's best knowledge, information, and belief, for the reason of preventing plaintiff from repossessing said automobile, and for the further reason that defendants are using said automobile for their private transportation purposes.

That the above indicated property has not been taken for a tax assessment or fine, pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff.

That the actual value of the property is approximately Two Thousand Dollars (\$2,000.00).

/s/ HALLIE F. BOLLEN.

Subscribed and sworn to before me this 8th day of December, 1955.

[Seal] /s/ JAMES K. TALLMAN,
Notary Public in and for Alaska. My Commission
Expires November 26, 1958.

To: The United States Marshal, Third Division,
Territory of Alaska:

You are hereby required to take from the defendants, Bernard Hansen and Suzanne Hansen, the property described in the within Affidavit and deliver said property to the plaintiff.

Dated this 4th day of December, 1955.

NEW & USED AUTO SALES, INC.

/s/ By HALLIE F. BOLLEN,
Its President.

Marshal's Return Attached.

[Endorsed]: Filed January 3, 1956.

[Title of District Court and Cause.]

M. O. RENDERING ORAL DECISION

No. A-11; 693.

Now at this time, this cause coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to-wit:

Now at this time arguments having been had heretofore and on the 24th day of December, 1955 in cause No. A-11,693, entitled New and Used Auto Sales, Inc., a corporation, Plaintiff, versus Bernard L. Hansen, a/k/a Barney Hansen, and Suzanne Hansen, Defendants.

Whereupon the Court now grants motion for summary judgment and defendant entitled to one-fourth sum he has paid in and counsel are to ap-

pear at a later date for testimony as to the accuracy of the statement of plaintiff.

Entered Journal No. G43, Page No. 160, January 6, 1956.

[Title of District Court and Cause.]

OBJECTIONS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND PROPOSED JUDGMENT

Comes now the Plaintiff above named, by and through its attorney, James K. Tallman, of the law firm of Bell, Sanders & Tallman, and objects to the proposed Findings of Fact and Conclusions of Law and objects to the proposed Judgment offered by Defendants herein, for the reason that said instruments are not based upon the true facts herein, and that the true facts have not yet been determined; for the further reason that said instruments do not conform to the law of conditional sales contracts, in effect in the Territory of Alaska; and for the further reason that said instruments, if given effect, would deprive Plaintiff of its property without due process of law in that Plaintiff has not yet been heard on the motion for summary judgment.

This objection is based upon the pleadings, papers, records, and affidavit of James K. Tallman, on file herein.

Dated at Anchorage, Alaska, this 11th day of January, 1956.

/s/ JAMES K. TALLMAN.

Acknowledgment of Service Attached.

[Endorsed]: Filed January 11, 1956.

[Title of District Court and Cause.]

AFFIDAVIT

United States of America

Territory of Alaska—ss:

James K. Tallman, being first duly sworn, on oath deposes and states:

He is the attorney of record for Plaintiff, above named, and that he has examined the records and files in this case herein and states that he executes this affidavit for the reason that certain information relevant to this action can be sworn to only by affiant, and is known by the officers of Plaintiff only upon information and belief.

That on or about the 23rd day of December, 1955, at some time after 11:00 a.m., this honorable Court started proceedings to hear a Motion for Summary Judgment brought by the Defendants herein. That due to the fact that sufficient time was not available, affiant was not heard, except on a few extraneous issues, although Defendants' attorney had completely presented his argument, being first as a moving party. Affiant further states that he was

specifically led to believe that the hearing on the Motion for Summary Judgment was continued to some future time, and affiant states that he specifically asked the Court the time, or date, to which the hearing was continued.

Affiant further states that on the 23rd day of December, 1955, he prepared a statement to Defendants and their attorney, setting forth the amount of the delinquent installment in default and the costs of retaking, keeping and storing the vehicle involved herein, and affiant states that he served a copy of said statement upon Defendants' attorney, Burton Biss, on the 23rd day of December, 1955. Affiant also states that he did prepare said statement in an attempt to conform to the suggestion of this Honorable Court so as to try to get the vehicle back to the Defendants as soon as possible. Affiant states that a copy of the statement is on file herein, having been filed on the 24th day of December, 1955. Affiant further states that despite the statement given to Defendants' attorney, no tender of the amount due as indicated in said statement has ever been made to affiant by either the Defendants or their attorney.

Affiant states upon information and belief, and from the Marshal's Return of Service on file herein, that the vehicle involved herein was taken on the 14th day of December, 1955, and that said vehicle was given into the custody of Plaintiff on the 17th day of December, 1955. Affiant therefore states that if the Marshal's Return of Service is true, that he prepared and served a copy of the statement on

the 6th day after Plaintiffs acquired possession of the vehicle, which is a reasonable time, and well within the ten day period as set forth by the Alaskan Statutes in effect and in particular in accordance with Section 29-2-18 ACLA (1949).

Affiant states that the amount indicated in the aforementioned statement is in the sum of \$214.68 and that no tender in that amount was ever made to affiant; that said sum covers the reasonable costs involved herein, plus the one delinquent installment and that certain of the sums itemized in said statement were not available to affiant until the 23rd day of December, 1955; that Defendant has claimed that certain of the items are unreasonable, in particular the cost of the undertaking in the amount of \$40.00, but affiant states that he prepared an undertaking for private sureties, took said undertaking to the office of the United States Marshal, but said Marshal refused to accept said undertaking and demanded a corporate undertaking and that affiant therefore was forced to obtain a corporate undertaking which cost \$40.00. Affiant further states that since the 3rd day of January, 1956, another installment is now delinquent in default in the amount of \$120.84, which has not yet been paid or tendered.

Affiant further states that the reference to the sum of \$225.00 in the affidavit of Bernard L. Hansen, dated December 20, 1955, was a reference to a check drawn by Defendant, in that amount, which was returned to Plaintiff, not honored by the bank; that affiant sued upon said check in the Commis-

sioner's Court for the Anchorage Precinct, but said suit was dismissed upon a technicality and is now upon appeal in docket No. A-11,713. Affiant further states that he is informed and so believes that said check in the amount of \$225.00 was for part of the down-payment upon the vehicle involved in this action.

Further affiant sayeth not.

/s/ JAMES K. TALLMAN.

Subscribed and sworn to before me this 11th day of January, 1956.

[Seal] /s/ BAILEY E. BELL,
Notary Public in and for Alaska. My Commission
Expires January 28, 1957.

Acknowledgment of Service Attached.

[Endorsed]: Filed January 11, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on regularly for hearing before the Court on the defendant's Motion for Summary Judgment at Anchorage, Alaska, on the 23rd day of December, 1955. The plaintiff appeared by its attorney, James K. Tallman, and was not present personally. The defendant appeared by his attorney, Burton C. Biss, and was not present personally.

It appeared to the Court that the Summons had been duly and regularly issued herein and that the defendant had been regularly served; it further appeared that the defendant had properly served and filed a Motion for Summary Judgment, supported by the Affidavits of the defendant and Blanche Avila; the plaintiff duly served and filed an opposing Affidavit signed by Hallie F. Bollen; defendant further filed a Memorandum of Authority setting forth the basis of his Motion for Summary Judgment; and upon the hearing of the Motion it appearing that there are no material facts the determination of which turns on credibility; and the Court being fully advised in the premises does hereby make and order entered the following, its

Findings of Fact

I.

That on the 31st day of December, 1954, the defendants entered into a Conditional Sales Contract with the plaintiff for the purchase of one 1955 Pontiac automobile bearing Motor number K755H82118, and Serial number K755H82118.

II.

That the defendants defaulted in the payment of an installment due on the 3rd day of December, 1955.

III.

That plaintiff re-posessed the automobile, and is still retaining it in its possession.

IV.

That plaintiff failed to furnish defendants a written statement of the amount due under the Conditional Sales Contract and the expenses of re-taking and keeping and storing the car, but defendants duly tendered to plaintiff a sum equal to or exceeding the amount due under the contract and the expenses of re-taking, keeping and storing the automobile, which tender was refused.

V.

That at the time plaintiff refused to accept defendant's tender, defendant had already paid the sum of Two Thousand Four Hundred Twenty Nine Dollars and Forty Cents (\$2,429.40) in payments under the contract, with interest.

And from the foregoing Findings of Fact, the Court does hereby make and deduce the following:

Conclusions of Law

I.

The defendants are entitled to the possession of the automobile.

II.

The defendants are entitled to continue in the performance of the contract as if no default had occurred.

III.

That the plaintiff failed to furnish to the defendants an accurate written statement of the sum due under the contract and the expense of re-taking, keeping and storage.

IV.

That the defendants tendered the amount due under the contract at the time of re-taking, and further tendered a sum sufficient to cover the expenses of re-taking, keeping and storage.

V.

That the plaintiff failed to accept the tender of the defendants, and failed to re-deliver the automobile to defendants, and failed to allow defendants to continue in the performance of the contract as if no default had occurred.

VI.

That defendants are entitled to the Decree of this Court awarding to them damages in the amount of One-Fourth of the sum paid in on the contract, namely, damages in the amount of Six Hundred Seven Dollars and Thirty Five Cents (\$607.35), plus attorney's fees in the amount of \$1.00.

Done by the Court and ordered entered at Anchorage, Alaska, this 26th day of January, 1956.

/s/ J. L. McCARREY, JR.,
District Judge.

Acknowledgment of Service Attached.

[Endorsed]: Filed January 11, 1956.

In the District Court for the District of Alaska,
Third Division

No. A-11,693

NEW AND USED AUTO SALES, INC.,
A Corporation, Plaintiff,

vs.

BERNARD L. HANSEN, a/k/a BARNEY HAN-
SEN, and SUZANNE HANSEN,
Defendants.

JUDGMENT

This matter coming on regularly for hearing before the Court on the defendant's Motion for Summary Judgment at Anchorage, Alaska, on the 23rd day of December, 1955, the plaintiff not being present in person and being represented by its attorney of record, James Tallman, and the defendant not being present in person and being represented by his attorney of record, Burton C. Biss, and it appearing to the Court that Summons had been duly and regularly issued herein and that the defendants had been personally served, and upon the hearing of said Motion, the defendants having duly served and filed affidavits in support of their Motion for Summary Judgment, from which it appears that there are no facts the determination of which turns on credibility, and that all of the material facts in support of the Motion are true; and the Court being fully advised in the premises and having entered herein its Findings of Fact and Conclusions of Law, it is

Ordered, Adjudged and Decreed that the defendants be, and they hereby are, granted Judgment against the plaintiffs in the amount of Six Hundred Seven Dollars and Thirty Five Cents (\$607.35), and an attorney's fee in the amount of One Dollar (\$1.00).

Done by the Court and ordered entered at Anchorage, Alaska, this 26th day of January, 1956, at the hour of 4:10 p.m.

/s/ J. L. McCARREY, JR.,
District Judge.

Entered Journal No. G-44, page 110, Jan. 26, 1956.

Acknowledgment of Service Attached.

[Endorsed]: Filed January 26, 1956.

[Title of District Court and Cause.]

HEARING ON FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Now at this time, this cause coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to-wit:

Now at this time, cause No. A-11,693, entitled New and Used Auto Sales, Inc., a Corporation, plaintiff, versus Bernard L. Hansen, a/k/a Barney Hansen, and Suzanne Hansen, defendants, came on regularly for Hearing on Findings of Fact and Conclusions of Law and Judgment; plaintiff represented

by James K. Tallman, of counsel; defendant represented by Burton C. Biss, of counsel.

Argument to the Court was had by James K. Tallman, for and in behalf of the plaintiff.

Argument to the Court was had by Burton C. Biss, for and in behalf of the defendants.

Argument to the Court was had by James K. Tallman, for and in behalf of the plaintiff.

Whereupon, Court having heard the arguments of respective counsel and being fully and duly advised in the premises; directs the plaintiff to return subject car to defendant and to pay to defendant $\frac{1}{4}$ amount of monies paid on contract by defendant.

Entered Journal No. G44, Page No. 133, January 31, 1956.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL AND TO SET ASIDE JUDGMENT AND TO STRIKE

Plaintiff moves for new trial in the above entitled action and further moves to set aside the judgment entered herein and to strike from the files and records the motion for summary judgment and the affidavits filed in support thereof for the reason that there is no law authorizing and no applicable rule of the Federal Rules of Civil Procedure that authorizes any such an act and the motion and all supporting affidavits should be

stricken and the judgment based thereon vacated and set aside. Plaintiff offers as further reasons in support of the above motion the following:

1. That the judgment does not dispose of all material issues in the case herein.

2. That the Findings of Fact upon which said judgment is based are not supported by the evidence, and in particular that paragraph four of the Findings of Fact is in conflict with the record herein in that the original of a written statement is on file herein upon which a receipt of a copy has been acknowledged by the Defendants' attorney; and the evidence further shows said statement was furnished defendants six days after the vehicle was actually acquired by plaintiff.

3. That the proceedings herein were irregular in that a motion for summary judgment was not the proper remedy for defendant since several issues of material fact were involved herein and that said issues of material fact were in dispute.

4. That the proceedings were irregular herein for the reason that the decision was rendered in this case before Plaintiff had been given an opportunity of argument and presentation of evidence, although defendant had fully presented oral argument and evidence in the form of affidavits; that said statement is supported by a letter from the Clerk of the District Court, dated January 10th, 1956, advising that motion for summary judgment had been granted.

5. That the action of the defendants was brought prematurely in that said motion for summary judg-

ment was filed and set to be heard before the expiration of the ten day period during which the seller shall retain the goods after retaking in accordance with Section 29-2-18 (ACLA 1949).

6. That the defendant has suffered no actual damages, except through his own refusal to pay the sum in the statement given to defendants on the 23rd day of December, 1955, and also given to the defendants six days after plaintiff got possession of the vehicle.

This motion is based upon the pleadings, papers and records on file herein.

Dated this 1st day of February, 1956.

BELL, SANDERS & TALLMAN,
/s/ By JAMES K. TALLMAN
Of Attorneys for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed February 2, 1956.

[Title of District Court and Cause.]

HEARING ON MOTION FOR NEW TRIAL

Now at this time, this cause coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to-wit:

Now at this time Hearing on Motion for New Trial in cause No. A-11,693, entitled New & Used Auto Sales, Inc., a corporation, plaintiff, versus

Bernard L. Hansen, a/k/a Barney Hansen, and Suzanne Hansen, defendants, came on regularly before the Court, plaintiff represented by James K. Tallman, of counsel, defendant represented by Burton C. Biss, of counsel, the following proceedings were had, to-wit:

Argument to the Court was had by James K. Tallman, for and in behalf of the plaintiff.

At 3:05 o'clock p.m. Court continued cause to 3:15 o'clock p.m.

Now at this time, this cause coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to wit:

Now came the respective counsel as heretofore and the Hearing on Motion for New Trial in cause No. A-11,693, entitled New & Used Auto Sales, Inc., a corporation, plaintiff, versus Bernard L. Hansen, a/k/a Barney Hansen, and Suzanne Hansen, defendants, was resumed.

Argument to the Court was had by Burton C. Biss, for and in behalf of the defendants.

Whereupon, Court having heard the arguments of respective counsel and being fully and duly advised in the premises, now denies motion for a New Trial and Motion to set aside Judgment and to Strike, and directs plaintiff to return the subject Motor Vehicle to the defendant, forthwith, and fixes attorney's fees at \$50.00, and directs counsel for defendant, to prepare written order accordingly.

Entered Journal No. G44, Pages No. 168-9, February 3, 1956.

[Title of District Court and Cause.]

ORDER

This matter came before the Court on February 3, 1956, on the Motion of plaintiff for a new trial and to set aside judgment and to strike; the plaintiff being represented by its attorney of record, James Tallman and the defendants being represented by their attorney of record, Burton C. Biss, and argument being made to the Court, and it appearing to the Court that the Motion was not well taken, and the Court being fully advised in the premises it is

Ordered that the plaintiff's motion for a new trial and to set aside the judgment and to strike be, and the same hereby is, denied; that plaintiff return the automobile which is the subject matter of this action to the defendants forthwith; that the plaintiff pay to the defendants the sum of Fifty Dollars (\$50.00) for attorney's fees herein.

Done by the Court and ordered entered at Anchorage, Alaska this 3rd day of February, 1956, at the hour of 4:15 P.M.

/s/ J. L. McCARREY, Jr.

District Judge.

Entered Journal No. G44, Page No. 169, Feb. 3, 1956.

Acknowledgment of Service Attached.

[Endorsed]: Filed February 3, 1956.

[Title of District Court and Cause.]

NOTICE

To Bernard L. Hansen, a/k/a Barney Hansen, and
Suzanne Hansen, and their attorney, Burton
Biss;

Please take notice that the above named Plaintiff, New and Used Auto Sales, Inc., a Corporation, herewith tenders to you the possession of one 1955, Pontiac automobile bearing Motor No. K755H82118, Serial No. K755H82118, which said automobile is the subject of litigation herein, upon the following conditions:

1. That you pay up all delinquent installments to date, consisting of an installment of \$120.84 due the 3rd day of December, 1955, an installment of \$120.84 due the 3rd day of January, 1956, and an installment of \$120.84 due the 3rd day of February, 1956.

2. That you pay the cost of retaking, keeping, and storage of said vehicle in the sum of \$93.84, which said costs are itemized in that certain statement served upon you on the 23 day of December 1955, and filed herein on the 24th day of December, 1955.

3. That you continue to make payments under the conditional sale contract entered into on the 31st day of December, 1954, between you and New & Used Auto Sales, Inc., as if no default had occurred.

Your are further notified the above offer shall not be construed as depriving Plaintiff of its right to appeal from the judgment against Plaintiff herein.

NEW & USED AUTO SALES, INC.,
Plaintiff,

BELL, SANDERS & TALLMAN,
/s/ By: BAILEY E. BELL,
Plaintiff's Attorney

[Endorsed]: Filed February 6, 1956.

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
Territory of Alaska—ss.

James K. Tallman, being first duly sworn, deposes and states:

That he served a copy of the attached notice upon the secretary of Burton Biss, at the law office of Burton Biss in the Central Building, Anchorage, Alaska, at the hour of 9:15 A.M. on the 6th day of February, 1956.

/s/ JAMES K. TALLMAN

Subscribed and Sworn to before me this 6th day of February, 1956.

[Seal] WILLIAM H. SANDERS
Notary Public in and for Alaska. My Commission
Expires: May 22, 1958.

[Endorsed]: Filed February 6, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that New & Used Auto Sales, Incorporated, a corporation, Plaintiff, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 26th day of January, 1956.

BELL, SANDERS & TALLMAN

/s/ By BAILEY E. BELL,
Attorneys for Appellant

[Endorsed]: Filed February 6, 1956.

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
Territory of Alaska—ss.

James K. Tallman, being first duly sworn, deposes and states:

That he served a copy of the attached notice of appeal upon the secretary of Burton Biss, at the law office of Burton Biss in the Central Building, Anchorage, Alaska, at the hour of 9:15 A.M. on the 6th day of February, 1956.

/s/ JAMES K. TALLMAN

Subscribed and Sworn to before me this 6th day of February, 1956.

[Seal] /s/ WILLIAM H. SANDERS,
Notary Public in and for Alaska. My Commission
Expires: May 22, 1958.

[Endorsed]: Filed February 6, 1956.

[Title of District Court and Cause.]

HEARING ON MOTION TO FIX SUPER- SEDEAS BOND

Now at this time, this cause coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to-wit:

Now at this time Hearing on Motion to Fix Supersedeas Bond in cause No. A-11,693, entitled New and Used Auto Sales, Inc., a corporation, plaintiff, versus Bernard L. Hansen, a/k/a Barney Hansen and Suzanne Hansen, defendants came on regularly before the Court, plaintiff represented by Bailey E. Bell and James K. Tallman, of counsel, defendant represented by Burton C. Biss, of counsel, the following proceedings were had, to-wit:

Argument to the Court was had by James K. Tallman, for and in behalf of the plaintiff.

Argument to the Court was had by Burton C. Biss, for and in behalf of the defendant.

Argument to the Court was had by James K. Tallman, for and in behalf of the plaintiff.

Whereupon, Court having heard the arguments of respective counsel and being fully and duly advised in the premises, fixes supersedeas bond at \$4,000.00.

Entered Journal No. G44, Page No. 206, Feb. 8, 1956.

[Title of District Court and Cause.]

HEARING ON JUSTIFICATION OF BONDS- MEN

Now at this time, this cause coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to-wit:

Now at this time Hearing on Justification of Bondsmen in cause No. A-11,693, entitled New & Used Auto Sales, Inc., a corporation, plaintiff, versus Bernard L. Hansen, a/k/a Barney Hansen, and Suzanne Hansen, defendants came on regularly before the Court, plaintiff represented by James K. Tallman, of counsel, defendant represented by Burton C. Biss, of counsel, the following proceedings were had, to-wit:

Hallie F. Bollen, being first duly sworn, testified for and in behalf of the plaintiff.

Florence N. Bollen, being first duly sworn, testified for and in behalf of the plaintiff.

A balance sheet, dated November 30, 1955, of New and Used Auto Sales, Inc., was duly offered, marked and admitted as Plaintiff's Exhibit 1.

Whereupon, Court having heard the testimony,

and being fully and duly advised in the premises, finds bondsmen qualified, providing they sign bond as a corporation and as individuals.

Entered Journal No. G44, Page No. 245, Feb. 16, 1956.

[Title of District Court and Cause.]

DESIGNATION OF POINTS

Appellant, New and Used Auto Sales, Inc., a corporation, hereby designates the following as points upon which appellant intends to rely:

(1) That the Lower Court erred in basing it's judgment herein upon a material question of fact which is in dispute.

(2) That the Lower Court erred in making findings of fact that are contrary to the record.

(3) That the Lower Court erred in making findings of fact based solely upon the affidavits of defendants.

(4) That several genuine issues of material fact are in dispute and have never been admitted by Appellant, but on the contrary, said issues have been denied by Appellant and evidence offered.

(5) That the motion for summary judgment was set for hearing three days after the filing and serving of said motion, contrary to Rule 56 (c) of the Federal Rules of Civil Procedure, and the Lower Court erred in hearing said motion three days after service upon Appellant.

(6) That the Lower Court erred in rendering a

decision on the motion for summary judgment before counsel for Plaintiff had presented argument.

(7) That the motion for summary judgment was not properly before the court since the motion for summary judgment was not responsive to the allegations of the complaint.

(8) That the Lower Court erred in refusing to give effect to an acceleration clause in the conditional sales contract, and holding that acceleration clauses are invalid.

BELL, SANDERS & TALLMAN
/s/ JAMES K. TALLMAN,
Attorneys for Appellant

Acknowledgment of Service Attached.

[Endorsed]: Filed March 5, 1956.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDING

Before: The Honorable J. L. McCarrey, Jr., U.S. District Judge.

Anchorage, Alaska, December 23, 1955, 11:30 o'clock a.m. * * * * *

Mr. Tallman: Yes, your Honor, that is correct. I will check this matter before we resume this hearing.

The Court: Well, excepting this: if by chance you want to take into consideration the position of the Court at this time as to damages, I think you better do it today.

Mr. Tallman: That's what I mean, your Honor. This will be resumed at 1:30.

The Court: Oh, no, the Court—this is the last case for the day.

Mr. Biss: If the Court please, there is one other small problem; that is, what are the expenses of retaking possession and so forth? As is set forth under the statute, he's required to pay the reasonable amounts. We have tendered first, what we felt to be the reasonable amount, and then we tendered a sum that we claimed reasonable, or unreasonable, including \$40.00 for repossession bond and everything else, so that probably, if there is any minor question to be answered, it will be what are the reasonable expenses.

The Court: Well, but then the Court wants to take that into consideration. We don't have time. The Court's indicated that he wants to adjourn and is going to adjourn. I just call your attention, out of fairness to you, Mr. Tallman, for your client, that if by chance you are in error and refuse to let the defendant have his car back over the holidays, that is a point to be considered by the Court, and will be considered by the Court. I would also point out to both counsel that the question of what is to be reasonable—under the circumstances I would not want to indicate at this time, but I think that you should on behalf of the Defendant, Mr. Biss, tender to them what they do claim as set forth, excepting for the acceleration and then this other matter can be determined at a later date. The Court will stand in recess until call of the gavel.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Wm. A. Hilton, Clerk of the above entitled court, do hereby certify that pursuant to the provisions of Rule 10 (1) of the United States Court of Appeals, Ninth Circuit, of Rules 75 (g) (o) of the Federal Rules of Civil Procedure, and of the designations of counsel for the respective parties, I am transmitting herewith the Original Papers in my office dealing with the above entitled action or proceeding, except the court reporter's transcript of the arguments of counsel, which transcript is to follow.

The papers herewith transmitted constitute the record on appeal, from the judgment filed and entered in the above entitled action by the above entitled court on January 26, 1956, to the United States Court of Appeals, Ninth Circuit, San Francisco, California.

Dated at Anchorage, Alaska, this 20th day of April, 1956.

[Seal] /s/ WM. A. HILTON,
Clerk.

[Endorsed]: No. 15,117. United States Court of Appeals for the Ninth Circuit. New and Used Auto Sales, Inc., a corporation, Appellant, vs. Bernard L. Hansen, also known as Barney Hansen and Suzanne Hansen, Appellees. Transcript of Record. Appeal from the District Court for the District of Alaska, Third Division.

Filed: April 30, 1956.

/s/ PAUL P. O'BRIEN

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15,117

NEW & USED AUTO SALES, INC.,

a corporation,

Appellant.

vs.

BERNARD HANSEN, also known as BARNEY
HANSEN, and SUZANNE HANSEN,

Appellees.

STATEMENT OF POINTS

Comes now the Appellant, New & Used Auto Sales, Inc., a corporation, and adopts as Appellant's statement of points for the purposes of this appeal, pursuant to Rule 17, Sub-section Six (6), of the Rules of Practice before the United States Court of Appeals for the Ninth Circuit, the heretofore filed designation of points, which said designation consists of eight (8) points.

Dated at Anchorage, Alaska, this 26th day of May, 1956.

BELL, SANDERS & TALLMAN

/s/ By JAMES K. TALLMAN,

Attorneys for Appellant

[Endorsed]: Filed May 29, 1956. Paul P.
O'Brien, Clerk.

No. 15,117

United States Court of Appeals
For the Ninth Circuit

NEW & USED AUTO SALES, INC.,
a corporation,

Appellant,

vs.

BERNARD L. HANSEN, also known as
Barney Hansen, and Suzanne Han-
sen,

Appellees.

BRIEF OF APPELLANT.

BELL, SANDERS & TALLMAN,
BAILEY E. BELL,
WILLIAM H. SANDERS,
JAMES K. TALLMAN,
Box 1599, Anchorage, Alaska,
Attorneys for Appellant.

FILED

FEB - 6 1957

PAUL P. O'BRIEN, CLERK

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No. 15,117

**United States Court of Appeals
For the Ninth Circuit**

NEW & USED AUTO SALES, INC.,
a corporation,

Appellant,

VS.

BERNARD L. HANSEN, also known as
Barney Hansen, and Suzanne Han-
sen,

Appellees.

BRIEF OF APPELLANT.

I.

JURISDICTION AND PLEADINGS.

A. Jurisdiction.

The jurisdiction of the District Court was invoked under the act of June 6, 1900, C. 786, Section 4, 31 Statutes 322, as amended, 48 U.S.C.A., Section 101. The jurisdiction of the Court of Appeals rests on Section 1290 of the new Federal Judicial Code, and Federal Rules of Civil Procedure.

This is an appeal from a summary judgment. The pertinent pleadings are set forth below.

B. Pleadings.

On December 9, 1955, the plaintiff, Appellant herein, filed a complaint to replevin one 1955 Pontiac automobile, which automobile was in the possession of the defendants, Appellees herein, the conditional vendees of the vehicle. (R 3-5.) An affidavit, necessary for the replevin action, was prepared for the Marshal and the Marshal was directed to pick up the automobile by the notice attached to the affidavit. (R 18-20.)

On December 20, 1955, a motion for summary judgment was filed by the Appellees (R 6) and a notice of motion was filed at the same time. (R 5.) This motion was supported by an affidavit of Bernard L. Hansen, one of the Appellees, which was executed on December 20, 1955. Another affidavit was also filed in support of the motion bearing the same date. (R 13-14.)

An affidavit in opposition to the motion for summary judgment was filed on December 21, 1955. (R 14-17.) The Court determined the motion for summary judgment by a minute order on January 6, 1956. (R 20.) Then the Appellant filed objections to proposed findings of fact and conclusions of law and proposed judgment. (R 21-22.) The objections were supported by an affidavit executed and filed on January 11, 1956. (R 22-25.) The findings of fact and conclusions of law and the judgment were signed on the 26th day of January 1956. (R 25-30.) After hearing on findings of fact and conclusions of law and judgment (R 30-31), Appellant filed a motion for new trial and to set aside judgment and to strike. (R 31-

33.) The hearing was held on this motion (R 33-34) and the motion was denied by an order dated February 3, 1956. (R 35). Notice of appeal was then filed on February 6, 1956. (R 38.)

II.

STATEMENT OF THE CASE.

On the 31st day of December, 1954, the Appellees herein, Bernard L. Hansen and Suzanne Hansen, entered into a conditional sales contract with the Appellant for the purchase of one 1955 Pontiac automobile. (R 3.) Part of the down payment on the automobile was made by a check in the amount of more than Three Hundred Dollars (\$300.00). (R 16.) This check was dishonored by the bank and when the Appellees picked up the check, part of the payment was made by another check in the amount of Two Hundred Twenty-five Dollars (\$225.00). (R 15.) The second check in the amount of Two Hundred Twenty-five Dollars (\$225.00) also bounced (R 16), and suit was brought on this second check of Two Hundred Twenty-five Dollars (\$225.00) in the local Justice's Court. Action in that matter is still pending, since the case was appealed from the Justice's Court to the District Court. (R 17.)

The second bad check in the amount of Two Hundred Twenty-five Dollars (\$225.00) was given by the Appellees to the Appellant after the first repossession of the automobile, sometime during the month of

August, 1955. (R 15.) Thus the Appellees got possession of the vehicle again by the somewhat questionable method of paying off one bad check with another bad check. Sometime after this transaction they permitted the conditional sales contract to be in default again and the Appellant repossessed the vehicle for the second time. (R 16.)

After obtaining possession of the vehicle upon the second repossession, the Appellant had the car placed on the car lot. While the car was in the possession of Appellant, Appellee Bernard L. Hansen took possession of the vehicle, without the consent of the Appellant, and drove the car off by using a second set of keys which he had in his possession. (R 16.) After the illegal retaking of the vehicle by the Appellee, the employees of Appellant attempted to get possession of the car again through peaceful means. (R 16.) However, the Appellee prevented such a repossession by a threat of force through the brandishing of a gun. (R 16.) Upon advice of counsel, the Appellant company brought the replevin action to obtain the possession of the vehicle through legal process. (R 16.) Upon the furnishing of an affidavit and directions to the Marshal, the vehicle was repossessed and taken into the custody of the U. S. Marshal on the 14th day of December, 1955. (R 7, 23.) The vehicle was apparently turned over to the Appellant on the 17th day of December, 1955. (R. 23.) Before the Marshal would repossess the vehicle for the Appellant, however, a corporate undertaking was required and such an undertaking was presented to the Marshal.

Although this action was started by a complaint, no answer was ever filed by the Appellees. A motion for summary judgment was prepared, served and filed three (3) days after the Appellant got possession of the vehicle, namely, on the 20th of December, 1955. (R 6.) This motion for summary judgment was noticed for hearing on the 23rd day of December, 1955, which was just three days after preparation, service and filing of the motion for summary judgment. (R 5.) A hearing on the motion was started on December 23, 1955 (R 42), and on January 6, 1956 the Court entered a minute order rendering oral decision in this matter, granting motion for summary judgment, and although the Court indicated in his minute order that "counsel are to appear at a later date for testimony as to the accuracy of the statement of plaintiff", no such testimony was ever introduced. (R 20-21.) When the Court referred to "plaintiff" he must have meant "defendant", since "plaintiff" was not asking for summary judgment.

Findings of fact and conclusions of law and judgment were prepared and served upon counsel for Appellant and counsel for Appellant filed objections to the proposed findings of fact and conclusions of law and proposed judgment (R 21), with the objections supported by an affidavit of the attorney representing Appellant. (R 22-25.) Argument was held on the findings of fact, conclusions of law and judgment on January 31, 1956. (R 30-31.) The result of the argument was that the Court sustained the previously entered judgment and in addition orally ordered the Appel-

lant to return the automobile to the Appellees. (R 31.) The judgment was an award to the Appellees of one-quarter ($\frac{1}{4}$) of the sum allegedly paid in by the Appellees upon purchase price of the vehicle. (R 30.)

On the same day that argument was started on the motion for summary judgment, namely, on December 23, 1955, a statement was served upon the counsel for the Appellees, setting forth the amount, due Appellant, which amounts were necessary to reinstate the contract and which also included the costs of retaking, keeping and storage. (R 17-18.) This statement set forth the items as follows:

Delinquent installment due Dec. 3, 1955	\$120.84
Late charge on delinquent installment	6.04
Cost of undertaking by Continental Casualty Co.	40.00
Cost of storage	5.00
Cost of filing suit	27.00
Marshal's fee in claim and delivery action	15.80
Total	<hr/> \$214.68

The Appellees at no time made an offer to pay this Two Hundred Fourteen and 68/100 Dollars (\$214.68) even though the Court instructed counsel for the Appellees to do so as follows:

"... but I think that you should on behalf of the Defendant, Mr. Biss, tender to them what they do claim as set forth, excepting for the acceleration and then this other matter can be determined at a later date. The Court will stand in recess until call of the gavel." (R. 43.)

The notice of this amount due, namely, the Two Hundred Fourteen and 68/100 Dollars (\$214.68), was served upon the Appellee six (6) days after Appellant acquired possession of the vehicle. That is, the Appellant acquired possession of the vehicle on the 17th day of December, 1955 (R 23) and this notice was served upon the Appellees on the 23rd day of December, 1955. (R 24.)

It is true that another statement had been given to the Appellees drawing attention to the acceleration clause of the contract which read as follows:

“In the event of default in the payment of any of the said installments when due as hereinabove provided, time being of the essence hereof, the holder of this note may without notice or demand declare the entire principal sum then unpaid immediately due and payable.” (R 12.)

Regardless of this first notice, the Appellant did serve the notice that the sum of Two Hundred Fourteen and 68/100 Dollars (\$214.68) would be accepted and the car turned over to the Appellees upon their payment thereof. This point was again brought to the attention of the Court and Appellees by the Appellant's motion for new trial and to set aside judgment and to strike.

Section 6 of the motion, to which reference is made, is quoted:

“That the defendant has suffered no actual damages, except through his own refusal to pay the sum in the statement given to defendants on the 23rd day of December, 1955, and also given to

the defendants six days after plaintiff got possession of the vehicle.” (R 33.)

Another attempt to get the car back to the Appellees and to have them pay the contract up to date was made on February 6, 1956, and a copy of the notice served upon counsel for Appellees. (R 36-37.) This offer merely requested that the Appellees pay up the delinquent installments and pay the costs of retaking, keeping and storage as set forth in the notice served upon them on the 23rd day of December, 1956. This latter sum amounted to Ninety-three and 84/100 Dollars (\$93.84), and was actually less than the actual cost to Appellant for the reason that this sum included storage in the total amount of Five Dollars (\$5.00) and only one late charge of Six and 04/100 Dollars (\$6.04). Regardless of the reasonableness of the offer, the Appellees refused to accept, with the result that the car has never been returned to them.

It should also be noted that, even by the affidavits of Appellees, the Appellant offered to turn the car back to the Appellees for the payment of the sums that were justly due Appellant, namely, the costs of retaking, keeping and storage and the delinquent installment plus the sum of Two Hundred Twenty-five Dollars. (\$225.00.) This last sum was part of the down payment paid by the bad check which was dishonored. (R 11, 13-14.)

It is the Appellant's position that all material questions of fact are not only in dispute, but that the material questions of fact that were determined by the Court are actually contrary to the record. Paragraphs

I, II, III of the findings of fact are not in issue, but are admitted and were actually pleaded in the complaint. These three paragraphs merely set forth the contract, the default of the contract, and the repossession of the vehicle. However, paragraphs IV and V (R 27) are the findings of fact upon which the judgment for one-quarter of the amount allegedly paid in was awarded to the Appellees. It is upon these findings that this case primarily turns.

III.

SPECIFICATIONS OF ERROR.

(1) That the Lower Court erred in basing its judgment herein upon a material question of fact which is in dispute.

(2) That the Lower Court erred in making findings of fact that are contrary to the record.

(3) That the Lower Court erred in making findings of fact based solely upon the affidavits of defendants, Appellees herein.

(4) That several genuine issues of material fact are in dispute and have never been admitted by Appellant, but on the contrary, said issues have been denied by Appellant and evidence offered.

(5) That the motion for summary judgment was set for hearing three days after the filing and serving of said motion, contrary to Rule 56 (c) of the Federal Rules of Civil Procedure, and the Lower Court erred in hearing said motion three days after service upon Appellant.

(6) That the Lower Court erred in rendering a decision on the motion for summary judgment before counsel for plaintiff, Appellant herein, had presented argument.

(7) That the motion for summary judgment was not properly before the Court since the motion for summary judgment was not responsive to the allegations of the complaint.

(8) That the Lower Court erred in refusing to give effect to an acceleration clause in the conditional sales contract and holding that acceleration clauses are invalid.

IV.

ARGUMENT.

A. THAT THE LOWER COURT ERRED IN BASING ITS JUDGMENT HEREIN UPON A MATERIAL QUESTION OF FACT WHICH IS IN DISPUTE.

THAT THE LOWER COURT ERRED IN MAKING FINDINGS OF FACT THAT ARE CONTRARY TO THE RECORD. (Points 1 and 2.)

Finding of fact IV concerned a very material question of fact and that is whether or not the Appellant furnished the Appellees with a statement of the amount due under the conditional sales contract. The materiality of this particular point rests upon the Conditional Sales Act in force in Alaska and is of major importance to this case. Two sections of the Conditional Sales Act would be pertinent here. One of them is Section 29-2-18, A.C.L.A. (1949), which reads in part as follows:

“ . . . Upon written demand delivered personally or by registered mail by the buyer, the seller shall furnish to the buyer a written statement of the sum due under the contract and the expense of retaking, keeping and storage. For failure to furnish such statement within a reasonable time after demand, the seller shall forfeit to the buyer ten dollars (\$10) and also be liable to him for all damages suffered because of such failure. . . .”

The other pertinent section is Section 29-2-25, which reads as follows:

“Recovery of damages by buyer after retaking goods. If the seller fails to comply with the provisions of Sections 18, 19, 20, 21 and 23 (Secs. 29-2-18, 29-2-21, 29-2-23 herein) after retaking the goods, the buyer may recover from the seller his actual damages, if any, and in no event less than one-fourth of the sum of all payments which have been made under the contract, with interest.”

Thus it appears that the Court made the finding of fact that no statement had been given in accordance with Section 29-2-18, and then awarded the Appellees one-quarter of the sum that they had claimed they had paid in. This resulted in a judgment of Six Hundred Seven and 35/100 Dollars (\$607.35), which is exactly one-quarter of the sum of Two Thousand Four Hundred Twenty-nine and 40/100 Dollars (\$2,429.40) allegedly paid in by the Appellee. (R. 7.) This finding of fact was specifically denied by an affidavit dated January 11, 1956, which stated:

“Affiant further states that on the 23rd day of December, 1955, he prepared a statement to De-

fendants and their attorney, setting forth the amount of the delinquent installment in default and the costs of retaking, keeping and storing the vehicle involved herein, and affiant states that he served a copy of said statement upon Defendants' attorney, Burton Biss, on the 23rd day of December, 1955. * * *'' R 23.)

This statement was made on January 11, 1956, to controvert the proposed findings of fact and the record indicates that the findings of fact were not signed by the Court until the 26th day of January, 1956. (R 28.) Thus there was ample time to deny this statement or to offer some other evidence to controvert this statement, but such was never done.

Regardless of the statement denying this particular finding of fact, the record itself indicates that a statement was presented to the Appellees. (R 17-18.) This statement was served on December 23, 1955 and was filed with the Clerk of the District Court on December 24, 1955. (R 18.)

In view of the evidence that was presented, it is difficult to determine just how the Court reached this particular finding of fact. Even the affidavits of the Appellees did not clearly set forth the question of whether or not a written statement was presented, so the only conclusion to be reached is that the Court must have found this particular fact from the argument of Appellees' counsel.

The procedure for summary judgment was not the proper method to use in determining this case, since the Court had to decide several important issues of

fact and these issues were material and genuine. The rule is quite clearly stated in 3 Barron & Holtzoff, Federal Practice and Procedure, 61-62:

“The summary judgment procedure is not a trial of disputed factual issues . . .”

For a case in which there were less genuine issues of material fact to be determined by the trier of fact than in the case at bar see *Miller v. Miller*, 122 Fed. 2d 209. This case involved the collection of unpaid installments of alimony under a Nevada divorce decree. The payments depended upon the age of the children and whether or not the wife ever remarried. Since the date was already past that at which the children would have reached their majority, the only question would be whether or not the wife had remarried. The wife stated that she had not remarried and the husband alleged that she had. The Appellate Court reversed it on the ground that there was a question of fact, stating at page 212 of its opinion:

“The children have reached their majority. It follows that, if appellee has remarried, the accrual of further installments of alimony ceased on her remarriage or on the majority of the younger child, whichever occurred later. Since there is a genuine issue as to a material fact, the court should ‘make an order specifying the facts that appear without substantial controversy *** and directing such further proceedings in the action as are just.’ ”

For another case standing for the proposition that the Court cannot try issues of fact by summary judgment, see *Toebelman v. Missouri-Kansas Pipe Line*

Co., 130 Fed. 2d 1016, where the Court states at page 1018 of its opinion in reference to the procedure:

“Stated conversely, a substantial dispute as to a material fact forecloses summary judgment. *McElwain v. Wickwire Spender Steel Co.*, 2 Cir., 1942, 126 F. 2d 210; *Miller v. Miller*, 1941, 74 App. D.C. 216, 122 F. 2d 209; *Whitaker v. Coleman*, 5 Cir., 1940, 115 F. 2d 305. Upon a motion for a summary judgment it is no part of the court’s function to decide issues of fact but solely to determine whether there is an issue of fact to be tried. *Ramsouer v. Midland Valley R. Co.*, D.C. Ark., 1942, 44 F. Supp. 523. All doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for a summary judgment. *Weisser v. Mursam Shoe Corporation*, 2 Cir., 1942, 127 F. 2d 344.”

For another apt and concise statement on this point, see *Parmelee v. Chicago Eye Shield Co.*, 157 Fed. 2d 582, at page 585 of the opinion wherein the Court states:

“The proceeding on motion for summary judgment is not to be regarded as a trial, but for the determination of whether or not there is a genuine issue to be tried. *** On such a motion *the burden of proof is on the moving party* to establish that there is no genuine issue of fact and all reasonable doubts are resolved against him. *Walling v. Fairmont Creamery Co.*, 8 Cir., 139 F. 2d 318.” (Emphasis supplied.)

As indicated in this case the burden of proof is on the party requesting summary judgment. In the case at bar Appellees have not only failed in not carrying

the burden of proof but the evidence tends to indicate that the exact opposite of the particular finding of fact discussed here is true.

Also see *Preston v. Aetna Life Ins. Co.*, 174 Fed. 2d 10, which stands for the proposition, among other things, that:

“The federal rule relating to summary judgment should be cautiously invoked.”

Three late cases that stand for the proposition that the truth must be clear before summary judgment will lie are *Koepfle v. Garavaglia*, 200 Fed. 2d 191, *Traylor v. Black, Sivalls & Bryson, Inc.*, 189 Fed. 2d 213, and *Chappell v. Goltsman*, 186 Fed. 2d 215.

The *Koepfle v. Garavaglia* case merely indicates, as summarized in the headnote:

“Summary judgment should not be permitted except where it is quite clear what the truth is.”

A clearer and more concise definition of the law on this point is set forth in the *Traylor v. Black, Sivalls & Bryson, Inc., et al.*, case, 189 Fed. 2d 213, wherein the Court states at page 216 of the opinion:

“A summary judgment upon motion therefor by a defendant in an action should never be entered except where the defendant is entitled to its allowance beyond all doubt. To warrant its entry the facts conceded by the plaintiff, or demonstrated beyond reasonable question to exist, should show the right of the defendant to a judgment with such clarity as to leave no room for controversy and they should show affirmatively that the

plaintiff would not be entitled to recover under any discernible circumstances. * * *”

The *Chappell* case, 186 Fed. 2d 215, merely indicates, at page 218, that:

“It is no part of the court’s duty to decide factual issues but only to determine whether there are any such issues to be tried. * * *”

With respect to the question of burden of proof and presumptions the cases hold, almost without exception, that doubts will be resolved against the movant. Typical of these cases is the case of *Dulansky v. Iowa-Illinois Gas & Electric Co.*, 191 Fed. 2d 881, wherein the Court stated at page 885:

“The burden of proof was upon the movant, not upon the plaintiffs, and all doubts are resolved against the movant.”

This statement was supported by six cases cited in the opinion, but for other late cases on this question of burden of proof wherein a summary judgment was reversed because of doubts against the movant, see:

Vale v. Bonnett, 191 Fed. 2d 334;

Dewey v. Clark, 180 Fed. 2d 766;

Hunter v. Mitchell, 180 Fed. 2d 763;

Hazeltine Research v. General Electric Co., 183 Fed. 2d 3.

In view of the authorities cited, there can be little doubt but that this point of law is as stated in 3 *Barron & Holtzoff* 81:

“One who moves for summary judgment has the burden of demonstrating clearly that there is no

genuine issue of fact. Any doubt as to the existence of such an issue is resolved against him. ***”

B. THAT THE LOWER COURT ERRED IN MAKING FINDINGS OF FACT BASED SOLELY UPON THE AFFIDAVITS OF DEFENDANTS, APPELLEES HEREIN. (Point 3.)

The Court below either made the determination as to findings of fact IV and V from the affidavits of Appellees or else the Court must have made the determination from facts not in the record, such as argument of counsel. This is the only conclusion that can be reached, since nowhere in the pleading or affidavits or statements of the Appellant are the facts admitted that are found in the findings of fact IV and V.

The exact opposite of an admission is the case with these two points, since the Appellant expressly denies the facts as found in finding of fact VI and offers the record to show that finding of fact IV is contrary to the evidence. With respect to finding of fact V, the undenied affidavits of Appellant would controvert this finding, at least in part.

One of the affidavits presented on behalf of Appellants indicates that part of the down payment on the vehicle involved in this case was made by a check that was dishonored. There were actually two checks which were dishonored by the bank, but the second one was used to pay, in part, the first. (R 16.) Nevertheless, it stands undenied that the \$225.00 bad check is still outstanding. It seems incredible that the Appellees can claim the full amount of Two Thousand Four Hundred Twenty-nine and 40/100 Dollars (\$2,429.40),

when part of it was paid by a bad check which has never been made good to this day.

Appellant admits that this item is not of major importance, since the amount paid in would be reduced only by the amount of the bad check. It could, however, have a great deal of bearing on the case if the issue of the amount of payment percentage-wise was ever raised. This is true in situations where the conditional sale vendee has paid more than half of the total contract price to the vendor and, in such a case, a different treatment of the chattel is required. It is conceivable that this issue will be raised in this case eventually.

The point herein is closely related to the points urged under heading "A" and that simply boils down to the plain statement that summary judgment should not be granted where there exists a genuine issue of material fact. This Court has even indicated that summary judgment will not be granted even where both sides moved for it as long as there exists a question of fact. *Hycon Manufacturing Company v. H. Koch & Sons*, 219 Fed. 2d 353.

This Court also set forth the rule in this respect in *Griffeth v. Utah Power & Light Company*, 226 Fed. 2d 661, wherein the Court stated at page 669 of the opinion:

" * * * The remedy can be invoked only when complete absence of genuine fact issue appears on the face of the record. Resort to summary judgment procedure is futile where there is any doubt as to whether there is a fact issue. All doubts

upon the point must be resolved against the moving party. This Rule, on account of these limitations, was not intended to be used as a substitute for a regular trial of cases where 'there are disputed issues of fact upon which the outcome of the litigation depends.' * * * "

The case at bar has one disputed, substantial and genuine question of material fact, in addition to others of less importance. Appellant contends that the summary disposal of this issue is reversible error.

C. THAT SEVERAL GENUINE ISSUES OF MATERIAL FACT ARE IN DISPUTE AND HAVE NEVER BEEN ADMITTED BY APPELLANT, BUT, ON THE CONTRARY, SAID ISSUES HAVE BEEN DENIED BY APPELLANT AND EVIDENCE OFFERED.

THAT THE LOWER COURT ERRED IN RENDERING A DECISION ON THE MOTION FOR SUMMARY JUDGMENT BEFORE COUNSEL FOR PLAINTIFF, APPELLANT HEREIN, HAD PRESENTED ARGUMENT. (Points 4 and 6.)

Throughout the proceedings on the motion for summary judgment the Appellant has attempted to offer evidence and argument in opposition to the motion for summary judgment. The transcript of proceedings (R 42-43) indicates that the Appellant was not heard completely on the matter. The record clearly shows, at page 43, that counsel for Appellant expected to be heard at some later time when he stated:

"That's what I mean, your Honor. This will be resumed at 1:30."

Then the Court stated:

"On, no, the Court—this is the last case for the day."

Then further on, on the same page, the Court stated:

“Well, but then the Court wants to take that into consideration. We don’t have time. The Court’s indicated that he wants to adjourn and is going to adjourn. * * *”

The rest of the discussion on page 43 also indicates that the matter was not concluded by that particular hearing, but no further argument was ever held before the Court indicated that he had granted summary judgment. (R 20.)

The record does not directly show that the argument on December 23rd was the only argument, but the Appellant’s motion for new trial and to set aside judgment and to strike does indicate this to be the case. Paragraph four of this motion reads as follows:

“4. That the proceedings were irregular herein for the reason that the decision was rendered in this case before Plaintiff had been given an opportunity of argument and presentation of evidence, although defendant had fully presented oral argument and evidence in the form of affidavits; that said statement is supported by a letter from the Clerk of the District Court, dated January 10th, 1956, advising that motion for summary judgment had been granted.” (R 32.)

It should also be noted that the Court’s decision on the question of summary judgment occurred even before January 10, namely, on January 6, 1956, as is indicated by the minute order rendering oral decision of the date. (R 20-21.)

Had the Appellant been given time and chance to do so, evidence on several matters would have been

introduced on the issues involved herein. The Appellant was never given a chance to argue, or to show, that the statement of the amount due in the total sum of \$214.68 was given to the Appellees on the 23rd day of December, 1955. Nor was the Appellant ever given a chance to show that the items contained in said statement were correct or were at least the minimum amounts due. No evidence, other than oral discussion was given to show that the cost of the undertaking was \$40.00. Nor was the Appellant given a chance to show that the Marshal's fee in the action was \$15.80 and that the late charge was \$6.04, nor was evidence given on the cost of storage which actually was more than \$5.00.

It is true that some of these points were brought out after the Court had made his decision on the question of summary judgment, but as soon as the Appellant found that the Court was going to grant a summary judgment the Appellant did object. (R 21.)

The objections to proposed findings of fact and conclusions of law and proposed judgment were filed on January 11, 1956, which is the same day that the proposed findings of fact and conclusions of law and judgment were filed. However, the hearing on the objections was not held until January 31, 1956, after both findings of fact and conclusions of law and judgment had been signed by the judge on January 26th. (R. 30-31.)

It is true that the work load of the District Court for the Third Judicial Division for the Territory of Alaska is extremely high. An overworked judge can't

be expected to keep all the details of every case in mind. Even so, an overloaded calendar is not sufficient justification for the disposition of a litigant's case without giving him a chance to be heard. That has occurred here.

D. THAT THE MOTION FOR SUMMARY JUDGMENT WAS SET FOR HEARING THREE DAYS AFTER THE FILING AND SERVICE OF SAID MOTION, CONTRARY TO RULE 56 (c) OF THE FEDERAL RULES OF CIVIL PROCEDURE, AND THE LOWER COURT ERRED IN HEARING SAID MOTION THREE DAYS AFTER SERVICE UPON APPELLANT. (Point 5.)

There can be no question whatsoever but that the time set for the hearing of the motion for summary judgment conflicted with Rule 56(c) of the Federal Rules of Civil Procedure. The rule clearly states:

“The motion shall be served at least 10 days before the time fixed for the hearing. * * *”

In this case the motion for summary judgment was dated December 20, 1955, and served and filed on the same day. (R. 6.) A notice of motion for summary judgment set the time for the hearing of the motion at 11:00 A.M. on the 23rd day of December, 1955, and this notice, too, was also served and filed on the same day as the motion. (R. 5.) Three days was the time set here, and this time was set by the moving party, the Appellees herein.

The argument will, of course, be urged that no objection was taken at the time to the setting of the hearing just three days after the filing and service of the motion. However, as a practical matter, if the

minimum time of ten days had been allowed, this case would probably not be before this Court on appeal at the present time. This conclusion can be reached because the ten days would have allowed counsel for both parties, and the Court, to be better prepared, and better informed as to both the facts and the law of this case. The record indicates that there must have been some confusion on the part of the lower Court in making his determination before completion of the hearing on motion.

The record also indicates that the Appellees were rushing the whole matter for reasons that are not obvious. The two affidavits of the Appellees in support of their motion were executed on the 20th day of December, 1955. (R. 11, 14.) Both affidavits indicate that on December 19th, offers and discussions were had with the Appellant's manager, Mr. Bollen. Thus it appears that the evidence was made on December 19th; the affidavits, motion for summary judgment and notice of motion were drafted on December 20th; and the hearing was set for December 23rd. No showing was made as to why such a rush was necessary, but it apparently worked to the advantage of the Appellees since the summary judgment was granted. Had Rule 56(c) been followed the resultant abuse of this case, in all probability, would never have followed.

It should also be noted that Rule 56(c) specifically provides for a ten day period after filing the motion. This is an exception to the time of five days set by Rule 6(d) for motions generally. The motion for summary judgment did not even meet the time require-

ments of Rule 6(d), since only three days' notice was given for the hearing.

E. THAT THE MOTION FOR SUMMARY JUDGMENT WAS NOT PROPERLY BEFORE THE COURT SINCE THE MOTION FOR SUMMARY JUDGMENT WAS NOT RESPONSIVE TO THE ALLEGATIONS OF THE COMPLAINT.

The complaint filed in this action (R. 3-5) was an action to replevin the vehicle involved herein. Whereas the motion for summary judgment was for judgment against the Appellant in the amount of \$607.25 plus interest and attorneys' fees, in addition to asking for an order to return the automobile. The possession of the automobile was undoubtedly an issue in this case that was raised by the complaint, but the question of this sum of \$607.25 has been raised nowhere in any of the pleadings other than in the motion for summary judgment, which does not even set forth the reason for the request. We thus end up with findings of fact and conclusions of law and judgment that are not even based upon pleadings, much less on the evidence.

Another point to consider is that since the Appellees have never denied the allegations of the complaint it must be assumed that they admit all matters well pleaded in the complaint. Yet the judgment granted does not take into consideration some of these allegations. Two of the items to be considered are the allegation that the Appellant was entitled to the possession of the automobile and the allegation that the Appellant was damaged in the amount of \$50.00 for the cost of recovering said personal property. The judgment

herein does not dispose of either of these particular points, although the Court did order the automobile returned to the Appellees by other orders. However, no mention has even been made in the judgment or findings of fact and conclusions of law concerning the damages of the Appellant in recovering the property upon which default had been permitted. Although this may not be of great importance, it does show the inconsistent pattern of all the proceedings herein.

F. THAT THE LOWER COURT ERRED IN REFUSING TO GIVE EFFECT TO AN ACCELERATION CLAUSE IN THE CONDITIONAL SALES CONTRACT AND HOLDING THAT ACCELERATION CLAUSES ARE INVALID.

The Appellant concedes that the general rule appears to be that acceleration clauses in the usual conditional sales agreement under the Uniform Conditional Sales Act are unenforceable. However, the acceleration clause in this case concerns the acceleration of a note and the clause is quoted in the statement of the case. (R. 12.) It should be noted that the clause refers to "this note."

Unfortunately the record does not include a copy of the complete instrument involved herein although this instrument was pleaded as Exhibit "A" in the complaint. (R. 3.) And the complaint stated that it was "made a part hereof as fully as if set forth herein in full."

Regardless of the fact that the complete instrument has not been printed in the record, the note is obviously

a part of the whole transaction. Since the acceleration clause merely refers to the acceleration of maturity by default of installment payments on the note, this raises a somewhat different question from the question of acceleration of the conditional sales contract.

The rule on the question of acceleration of a note appears to be clearly set forth in 8 Am. Jur. 30, Section 286, of Bills and Notes:

“Instruments payable at fixed times frequently provide that if an instalment of interest or principal is not paid when due, the holder of the instrument may declare the whole debt due. This option of the holder to declare the whole debt due must be exercised within a reasonable time. The exercise of the option may be effected by a demand upon the person primarily liable upon the instrument. * * *”

The last proposition is supported by a case that stands for the proposition, as indicated in the footnote (8 Am. Jur. 30):

“One is not prevented from declaring a note the principal of which is payable in instalments immediately due for nonpayment of an instalment, as provided in the contract, because of simultaneous default in payment of usurious interest, and because of the provision of the statute that any agreement to pay usury is void, that no action to recover interest shall be maintained, and that the debt cannot be declared due until the full period of time it was contracted for has elapsed. *Haines v. Commercial Mortg. Co.*, 200 Cal. 609, 254 P. 956, 255 P. 805, 53 A.L.R. 725.”

Since the printed record does not include the whole of the note involved herein, further discussion of the acceleration question appears remiss. However, it appears abundantly clear that the Court below did not consider or dispose of the mixed question of law and fact concerning the acceleration of the note. This was just another result of the rushing and confusion below which in turn, caused the incredibly summary treatment accorded this question of summary judgment.

CONCLUSION.

In conclusion Appellant submits that the Court below has followed neither the spirit nor the letter of Rule 56 of the Federal Rules of Civil Procedure and that the arbitrary determination of genuine issues of material fact and the failure to dispose of others can only be remedied by a reversal of the judgment herein.

Dated, Anchorage, Alaska,
January 25, 1957.

BELL, SANDERS & TALLMAN,
BAILEY E. BELL,
WILLIAM H. SANDERS,
JAMES K. TALLMAN,
Attorneys for Appellant.

No. 15,117

United States Court of Appeals

For the Ninth Circuit

NEW & USED AUTO SALES, INC.,
a corporation,

Appellant,

vs.

BERNARD L. HANSEN, also known as
Barney Hansen, and SUZANNE HAN-
SEN,

Appellees.

BRIEF OF APPELLEES.

BURTON C. BISS,
220 Central Building, Anchorage, Alaska,
Attorney for Appellees.

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PAUL P. O'BRIEN

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No. 15,117

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NEW & USED AUTO SALES, INC.,
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vs.

BERNARD L. HANSEN, also known as
Barney Hansen, and SUZANNE HAN-
SEN,

Appellees.

BRIEF OF APPELLEES.

I.

JURISDICTION AND PLEADINGS.

Appellees concur in the statement of jurisdiction in Appellant's brief pages one through three.

II.

STATEMENT OF THE CASE.

Although a statement of the case is contained in Appellant's brief (pages three through nine) it is considered necessary to embody in this brief a state-

ment of the case which more clearly reflects the facts upon which the judgment was based.

On the 31st day of December, 1954, the parties entered into an automobile conditional sales contract (R-3) and Two Thousand Four Hundred Twenty-nine Dollars Forty Cents (\$2,429.40) having been paid on the contract (R-7) Appellant filed suit to repossess six days after default in the December 3, 1955 monthly payment (R-4, 5), at the same time terminating the escrow payment arrangement at the bank (R-7). On December 16, 1955, Appellees attempted to pay Appellant, requesting a statement of the delinquency, plus costs of retaking, keeping and storing but instead, on December 17, 1955, were given a statement for the entire remaining balance. (R-7, 9).

On December 19, 1955, Appellees tendered payment of the delinquency plus costs of retaking, keeping and storing, but Appellant refused to accept payment and return the car (R-10, 11, 13, 15). Upon Appellant's refusal to allow payment of the delinquency or furnish a correct statement of costs, and upon Appellant's retention of the automobile, a statutory claim for relief accrued to Appellees.

To force return of the automobile and continuation of the contract, on December 20, 1955, a motion for summary judgment seeking statutory damages and continuation of the contract was made on behalf of Appellees which motion was argued on December 23, 1955 (R-5).

The argument on the motion dealt with the acceleration of a conditional sales contract upon de-

fault. Following argument of the motion on December 23, 1955, Appellant served a second statement on attorney for the Appellees, and further presentation was made on December 24, 1955 (R-20, 21). No objection was ever made to the length of notice on this motion during these arguments.

On January 6, 1956, the Court rendered oral decision on the motion (R-20, 21) indicating that the accuracy of the costs of retaking, keeping and storing contained in Appellant's statements was still open to question (R-21). Proposed findings of fact and conclusions of law and judgment were filed January 11, 1956 (R-28) and objections were filed the same date (R-22).

Following the hearing on these objections the Court ordered Appellant to return the car together with one-fourth of the moneys theretofore paid on the contract, signing the findings of fact, conclusions of law and judgment (R-28, 30-31).

A motion for a new trial, to set aside judgment and to strike was made on February 2, 1956, and argument having been had was denied (R-34-35). Notice of appeal was given and this appeal followed.

The question presented to the lower Court in connection with the motion for summary judgment on December 23, 1955, was whether an acceleration clause in a conditional sales contract is enforceable against a buyer in default.

After this motion had been made and argued, Appellant attempted to create a new fact situation by

serving a second statement (R-17, 18) and numerous affidavits in connection with additional Court appearances as set forth in the transcript of record from page seventeen (17) through thirty-seven (37).

The motion was actually decided by the lower Court on the first sixteen and one-half (16½) pages of the record.

III.

ARGUMENT.

A. SPECIFICATIONS OF ERROR NOS. 1, 2, 3, AND 4.

1. THAT THE LOWER COURT ERRED IN BASING ITS JUDGMENT HEREIN UPON A MATERIAL QUESTION OF FACT WHICH IS IN DISPUTE.
2. THAT THE LOWER COURT ERRED IN MAKING FINDINGS OF FACT THAT ARE CONTRARY TO THE RECORD.
3. THAT THE LOWER COURT ERRED IN MAKING FINDINGS OF FACT BASED SOLELY UPON THE AFFIDAVITS OF DEFENDANTS, APPELLEES HEREIN.
4. THAT SEVERAL GENUINE ISSUES OF MATERIAL FACT ARE IN DISPUTE AND HAVE NEVER BEEN ADMITTED BY APPELLANT, BUT, ON THE CONTRARY, SAID ISSUES HAVE BEEN DENIED BY APPELLANT AND EVIDENCE OFFERED.

Appellant (Appellant's brief—9) states that this appeal turns on Paragraphs IV and V (R-27) of the findings of fact. These first four specifications of error, made in very general terms, are grouped together here for the purposes of argument.

Concerning finding of fact IV (R-27), Appellant first argues that the lower Court erred in finding:

“That Plaintiff failed to furnish Defendants a written statement of the amount due under the

conditional sales contract and the expenses of retaking and keeping and storing the car . . .” (R-27).

Appellant takes this position because, after first giving only a general oral statement on the 16th day of December, 1955 (R-8), and then giving an unlawful written statement demanding the entire contract balance on the 17th day of December, 1955 (R-9), and after a motion for summary judgment had been made, and argued, and the Court orally indicated a disposition to rule in favor of Appellees (R-42), then Appellant delivered a second written statement (R-17, 18) which they now contend satisfied the statutes for the purposes of the motion.

The statutory claim for relief accrued when Appellant refused to allow Appellees to continue in the performance of their contract and forced them to secure legal assistance to protect their rights, Appellant meanwhile insisting on a total forfeiture. Appellant argues as though the second, subsequent statement excused all previous disregard of Appellees’ rights.

Appellant did not give notice of intention to retake the automobile (R-7).

Section 29-2-18, A.C.L.A. 1949 (Sec. 18 of the Uniform Conditional Sales Act) reads as follows:

“Redemption by Buyer: Seller to Furnish Statement of Sum Due.

If the seller does not give notice of intention to retake described in Section 17 (Sec. 29-2-17 herein), he shall retain the goods for ten days after

the retaking within the state in which they were located when retaken, during which period the buyer, upon payment or tender of the amount due under the contract at the time of retaking and interest, or upon performance or tender of performance of such other condition as may be named in the contract as precedent to the passage of the property in the goods, or upon performance or tender of performance of any other promise for the breach of which the goods were retaken, and upon payment of the expenses of retaking, keeping and storage, may redeem the goods and become entitled to take possession of them and to continue in the performance of the contract as if no default had occurred. Upon written demand delivered personally or by registered mail by the buyer, the seller shall furnish to the buyer a written statement of the sum due under the contract and the expense of retaking, keeping and storage. For failure to furnish such statement within a reasonable time after demand, the seller shall forfeit to the buyer Ten Dollars (\$10.00) and also be liable to him for all damages suffered because of such failure. If the goods are perishable so that retention for ten days as herein prescribed would result in their destruction or substantial injury, the provisions of this section shall not apply, and the seller may resell the goods immediately upon their retaking. The provisions of this section requiring the retention of goods within the state during the period allowed for retention shall not apply to the goods described in Sec. 8 (Sec. 29-2-8 herein).''

Sec. 29-2-25 A.C.L.A. 1949 (Sec. 25 Uniform Conditional Sales Act) reads as follows:

“Sec. 29-2-25. Recovery of Damages by Buyer After Retaking Goods. If the seller fails to comply with the provisions of Sec. 18, 19, 20, 21 and 23 (Sec. 29-2-18-29-2-21, 29-2-23 herein) after retaking the goods, the buyer may recover from the seller his actual damages, if any, and in no event less than one-fourth of the sum of all payments which have been made under the contract, with interest.”

Section 29-2-26 A.C.L.A. 1949 (Sec. 26 Uniform Conditional Sales Act) provides in part as follows:

“Sec. 29-2-26. Waiver of Statutory Provisions: Effect of Provision for Recision. No act or agreement of the buyer before or at the time of the making of the contract, nor any agreement of, or statement by, the buyer in such contract, shall constitute a valid waiver of the provisions of Section 18, 19, 20, 21 and 25 (Sec. 29-2-18-29-2-21, 29-2-25 herein) . . .”

Appellees served a written demand upon Appellant for a statement of the sum due under the contract and the expense of retaking, keeping and storage (R-7, 8). Appellant furnished a written statement, but it was not a written statement of the “sum due under the contract and the expense of retaking, keeping and storage”, being instead a statement of the net pay-off of the principal sum plus various costs (R-11, 12). Appellees, within ten days of the retaking, tendered the amount due under the contract at the time of retaking and interest, and the expenses of retaking, keeping and storage (R-6-14). The lower Court re-

fused to be misled by Appellant's later attempt to alter the fact situation, existing at the time the motion for summary judgment was filed; by service of a second written statement after the motion had been argued. The Finding of Fact was exactly correct because Appellant failed to furnish the statement required by the statute.

The remaining portion of Finding of Fact IV relating to the tender of the sum due under the contract and the expense of retaking, keeping and storage is specifically admitted in Appellant's affidavit dated December 21, 1955 (R-15), which affidavit was made and filed when Appellant was still attempting to retain the car by virtue of an acceleration clause in the conditional sales contract. The lower Court was personally aware of the time sequence of these statements because of the repeated Court appearances.

Concerning Finding of Fact V (R-27) setting forth the sum paid in on the contract, the lower Court considered Appellant's colored recital concerning a check which was the subject of a previous collection action decided in favor of Appellees and appealed by Appellant from the Justice Court for the Anchorage Precinct (improperly designated "Commissioner's Court") to the District Court for the District of Alaska, Third Division, case no. A-11,713. The lower Court refused to allow Appellant to interject that unsuccessful lawsuit into this one on the basis of "information and belief" of Appellant's attorney (R-24, 25).

Rule 56 (e) of the Federal Rules of Civil Procedure provides:

“Rule 56. Summary Judgment. (e) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.”

In its complaint, Appellant makes no mention of this now denominated “delinquency”. In Appellant’s affidavit (R-16) mention is made in highly emotional language of two checks and previous attempted repossessions, but it is clear that the check discussed in Appellant’s brief was not a down payment check. Appellant failed to designate that part of its complaint pleaded as Exhibit “A” which was the conditional sales contract containing an acknowledgment of receipt of down payment, and the complete acceleration clause which was the basis of the motion and arguments in the lower Court.

The lower Court had before it the sworn pleadings showing the delinquency to be \$120.84 and the conditional sales contract as well as the affidavit of Appellee Hansen (R-7) and Appellant’s first statement (R-13) from which to compute the statutory damages. No question of fact was ever raised concerning the total amount paid on the contract by Appellees, and in the multitude of affidavits signed by Appellant and Appellant’s attorney, the fact stated in Appellee’s affidavit (R-7) that Two Thousand Four Hundred

Twenty-nine Dollars Forty Cents (\$2,429.40) had been paid on the contract was never controverted.

Point 4 of Appellant's specifications is apparently directed toward what are claimed to be the costs of retaking, keeping and storing as contemplated by Sec. 29-2-18 A.C.L.A. 1949 (*supra*). Appellant feels the amount was in dispute.

The complaint sets the sum of Fifty Dollars (\$50.00) as the "cost of recovering said personal property from defendants" (R-4), and the allegation was admitted by the motion. The first written statement rendered, which prompted this motion, listed the claimed costs (R-12) as Eighty-one Dollars Sixty Cents (\$81.60). The second written statement (R-18) contained a new item of costs and a changed item for a total of Ninety-three Dollars Eighty-four Cents (\$93.84). Orally, Appellant demanded (R-10) Two Hundred Seven Dollars Forty-four Cents (\$207.44) as the total of the delinquent payment plus costs which would place the costs at Eighty-six Dollars Sixty Cents (\$86.60). In its brief, Appellant claims that although the record doesn't show it, the costs were actually more than any of these. The record does show that the Appellees tendered Two Hundred Seven Dollars Forty-four Cents (\$207.44) (R-11) in cash which totalled the delinquency plus costs of retaking, keeping and storage claimed at that particular time by Appellant, and that the tender was refused.

Sec. 29-2-18 A.C.L.A. 1949 (*supra*) required Appellant to furnish to Appellees a written statement of

the sum due under the contract and the expense of retaking, keeping and storage, and it would appear that any requirement of accuracy in this statement is for the benefit of Appellees, to protect them from overcharges, not for the protection of Appellant who is dominus of the statement.

According to Appellant's brief (Appellant's brief page 21), a full, correct statement has never yet been given. Whether any of the claims made were correct is immaterial because Appellees tendered payment of the expenses as claimed, and tender was refused. The actual correctness of any of these statements will remain immaterial since Appellant, in the face of the order of the lower Court while appealing, this matter sold the vehicle to itself at a "repossession sale" on March 26, 1956 following posting of notices by James K. Tallman.

The lower Court found, in Finding of Fact IV (R-27) that "Defendants duly tendered to plaintiff a sum equal to or exceeding the amount due under the contract and the expenses of retaking, keeping and storing the automobile, which tender was refused."

The tender was in the amount of Two Hundred Seven Dollars Forty-four Cents (\$207.44) (R-11). The complaint gave the cost of recovery as Fifty Dollars (\$50.00) which added to the delinquency totals One Hundred Seventy Dollars Eighty-four Cents (\$170.84). The first written statement listed expenses which, added to the delinquent installment, would total Two Hundred Two Dollars Forty-four Cents (\$202.44). The oral claim for expenses (R-10)

was in the amount of Two Hundred Seven Dollars Forty-four Cents (\$207.44). Thus the lower Court was correct in its findings.

The motion for summary judgment was made at this point and the lower Court being appraised by Appellant's affidavit (R-15) that "affiant admits that the defendant, Bernard Hansen, tendered certain payments as indicated in his affidavit of December 20, 1955, on file herein . . .", the lower Court found the facts as of the time of the motion. Appellees' subsequent claims could not alter the fact situation.

B. THAT THE LOWER COURT ERRED IN RENDERING A DECISION ON THE MOTION FOR SUMMARY JUDGMENT BEFORE COUNSEL FOR PLAINTIFF, APPELLANT HEREIN, HAD PRESENTED ARGUMENT.

Appellees' specification No. 6 is based on two misleading arguments. The first part relies on the printing of a very short excerpt from the transcript of proceeding of the argument had on December 23, 1955 (R-42, 43). Appellant attempts to lead this Court into believing that Appellant was never accorded time to argue, and does this by printing a request by counsel for further argument after the Court had already been satisfied at length.

Although Appellant designated the record of the hearing on findings of fact, conclusions of law and judgment (R-30) and the hearing on the motion for new trial (R-33) and the hearing on the motion to fix supersedeas bond (R-39) and the hearing on justification of bondsmen (R-40, 41), Appellant some-

how neglected to designate the record of the hearing on the motion for summary judgment which resulted in the minute order rendering the oral decision (R-20, 21). If this had been printed, counsel could not claim that argument was not allowed.

Even the record as printed only shows that counsel wanted to be heard further, but the lower Court, having accorded the privilege of oral argument, did not desire to spend more time on what was already clear.

The second point in support of Appellant's theory that they were never allowed to offer evidence and argument, is to the effect that after the hearing on December 23, 1955, "no further argument was ever held before the Court indicated that he had granted summary judgment." (Appellant's brief page 20). This would seem to be misleading inasmuch as the minute order states that the arguments were also had on the 24th day of December, 1955. (R-20). At that time Appellant had filed its second written statement (R-17, 18). Informal conferences had by the attorneys with the Court in chambers in an attempt to settle the matter are not a part of this record.

C. THAT THE MOTION FOR SUMMARY JUDGMENT WAS SET FOR HEARING THREE DAYS AFTER THE FILING AND SERVICE OF SAID MOTION, CONTRARY TO RULE 56 (c) OF THE FEDERAL RULES OF CIVIL PROCEDURE, AND THE LOWER COURT ERRED IN HEARING SAID MOTION THREE DAYS AFTER SERVICE UPON APPELLANT.

As pointed out in Appellant's brief (Appellant's brief—22) Rule 56 (c) of the Federal Rules provides that a motion for summary judgment shall be served

at least ten days before the time fixed for the hearing. In this case, only three days' notice was given.

Appellant, without objection, argued the motion and introduced affidavits on the 23rd day of December, 1955, and on the 24th day of December, 1955. Appellant further argued objections to the proposed findings of fact and conclusions of law and proposed judgment, which was a rehash of the entire proceedings (R-21-25) and once again argued a motion for a new trial and to set aside judgment and to strike, reviewing the entire history of the case (R-31-35), but never in the numerous Court appearances did Appellant object to the length of notice.

Under the circumstances, Appellant should be found to have waived any objection available.

D. THAT THE MOTION FOR SUMMARY JUDGMENT WAS NOT PROPERLY BEFORE THE COURT SINCE THE MOTION FOR SUMMARY JUDGMENT WAS NOT RESPONSIVE TO THE ALLEGATIONS OF THE COMPLAINT.

No authority is cited by Appellant in support of this specification. So far as the allegations of the complaint were concerned, they were admitted by the motion. The entire admitted complaint, together with Sec. 29-2-18, and 29-2-26 A.C.L.A. 1949 (supra) taken with the affidavit of Hansen (R-6-12) and the affidavit of Blanche Avila (R-13, 14) set the statutory damages.

Appellant, on default of the monthly installment payment was entitled to possession of the vehicle, and the Appellees, upon tendering payment were entitled

to have it back and to continue in the performance of the contract.

Appellant in Paragraph 6 of the complaint (R-4) alleged the cost of the recovery to be Fifty Dollars (\$50.00). This was admitted by Appellees, although denied and revised steadily upward by Appellant on numerous subsequent occasions. The Court in its minute order (R-20-21) requested Appellant to settle on one figure for the costs of retaking, keeping and storing, having at that time considered Appellant's claim for Fifty Dollars (\$50.00), Eighty-one Dollars Sixty Cents (\$81.60), Eighty-six Dollars Sixty Cents (\$86.60) and Ninety-three Dollars Eighty-four Cents (\$93.84). Appellant in subsequent Court appearances, including its objections to the proposed findings and judgment never complied with the lower Court's request to submit an accurate statement until after the motion for a new trial was denied on February 3, 1956 (R-35), when Appellant selected one set of costs by finally filing a fifth claim, which was served and filed together with a notice of appeal (R-36-39). Appellees tendered the highest expenses claimed up to the time of the tender (R-10), which exceeded the allegation in the complaint. Appellant claimed the various sums for expenses, none of which were denied by Appellees; although in the motion the Appellees admitted the allegations of the complaint, the lower Court because of Appellant's repeated changes of position and failure to submit a final correct statement, simply refused to grant any relief at all to Appellant for expenses of repossession.

E. THAT THE LOWER COURT ERRED IN REFUSING TO GIVE EFFECT TO AN ACCELERATION CLAUSE IN THE CONDITIONAL SALES CONTRACT AND HOLDING THAT ACCELERATION CLAUSES ARE INVALID.

Appellant failed to designate material portions of the record including the complete conditional sales contract. The case in the lower Court turned upon the construction and effect of the acceleration provisions of this document. Appellant declared "The entire principal sum remaining unpaid on your conditional sales contract due and payable . . ." (R-12). No note was made a part of the record in this case. Appellant's arguments on this specification do not deal with acceleration under the Uniform Conditional Sales Act provisions in effect in Alaska, Sections 29-2-1 through 29-2-30 A.C.L.A. (1949).

Appellees throughout this proceeding sought only the recognition of their rights as guaranteed by Sections 29-2-18, 29-2-25 and 29-2-26 A.C.L.A. (1949) (supra), whereas Appellant determined upon a forfeiture by consistently demanding sums of money exceeding the funds available to Appellees.

Appellees requested a written statement (R-7, 8). Appellant responded claiming the entire remaining balance (R-11, 12). Appellees, at the office of Appellant's attorney and in the attorney's presence, tendered the sum subsequently claimed (R-10) but the tender was refused and a persistent attempt to claim the entire remaining balance was made (R-14).

To allow an acceleration would be to promote forfeitures undermining the purpose of the Uniform Conditional Sales Act. Annotations on this point are

found in 83 A.L.R. 976 and 99 A.L.R. 1301. A case most in point is *Clark v. Tri-State Discount Co.* (1934) 151 Misc 679, 271 NYS 779, where an attempted acceleration was specifically disallowed.

This action was brought on contract, seeking possession of the security, not on the note which apparently only served as additional evidence of the debt. Appellant's argument that the Court should have allowed an acceleration of the note is not in point. But even if it were a suit on the note for a money judgment only, the result would still be forfeiture and prohibited under the reasoning of *Clark v. Tri-State Discount Co.* (supra).

CONCLUSION.

No material questions of fact were in dispute and the lower Court's Findings of Fact are supported by the entire record; the lower Court duly entered judgment following arguments on the motion for summary judgment, and properly refused to give effect to the acceleration clause in the conditional sales contract.

Dated, Anchorage, Alaska,

February 20, 1957.

Respectfully submitted,

BURTON C. BISS,

Attorney for Appellees.

No. 15118

United States
Court of Appeals
for the Ninth Circuit

MILDRED REED WOOD, Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the Southern District of California,
Southern Division

FILE

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PAUL P. O'BRIEN, C

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

Attorney for Appellant:

CHARLES ELWYN KARPINSKI,

640 San Diego Trust & Savings Building,
San Diego, California

Attorneys for Appellee:

LAUGHLIN E. WATERS,

U. S. Attorney,

MAX F. DEUTZ,

Asst. U. S. Attorney,

Chief of Civil Division

ANDREW J. DAVIS,

Asst. U. S. Attorney,

600 Federal Building,

Los Angeles 12, California [1*]

* Page numbers appearing at foot of page of original Transcript of Record.

United States District Court, Southern District
of California, Southern Division

No. 1656-SD

MILDRED REED WOOD, Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

COMPLAINT

Plaintiff complains of defendant, and for cause of
action alleges:

I.

That plaintiff is a resident of the Southern District of California, Southern Division; said action is brought under the National Life Insurance Act of 1940, as amended; that at all times since January 6, 1948, plaintiff has been the duly designated beneficiary under the policy mentioned hereinafter.

II.

That on or about the 1st day of June, 1943, Lawrence C. Reed applied for and was granted National Service Life Insurance Policy #N 10 815 106 in the amount of \$10,000.00.

III.

That from the 1st day of June, 1943, to and including the 31st day of December, 1947, said Lawrence C. Reed made premium payments by means of an allotment deduction from his service pay check.

IV.

That on or about the 31st day of December, 1947, said [2] Lawrence C. Reed was retired from the United States Army at the post of **Corozal, Canal Zone**.

V.

That upon Lawrence C. Reed's retirement, he authorized the United States of America to deduct the premiums for said National Service Life Insurance Policy #N 10 815 106 from his retirement pay.

VI.

That due to the negligence of defendant or its agents, acting in the course and scope of their agency and employment, no deductions from said Lawrence C. Reed's retirement pay were made.

VII.

That on or about the 6th day of February, 1949, Lawrence C. Reed died in the Canal Zone.

VIII.

That at some time immediately subsequent to the 6th day of February, 1949, plaintiff duly made claim in writing to the United States of America for payment of death benefits under the policy of insurance, #N 10 815 106 and submitted evidence establishing the right to such payment. That plaintiff's claim was disallowed by the Veterans Administration on or about the 4th day of August, 1949; and on the 31st day of October, 1950, the Board of

Veterans Appeals denied the appeal from the ruling of the Veterans Administration.

IX.

That a disagreement exists between plaintiff and the Veterans Administration as to whether a contract of insurance was in force at the time of death of Lawrence C. Reed on the life of said Lawrence C. Reed.

X.

That plaintiff has been forced to employ attorneys to bring this action for her and to prosecute claim to judgment, and such attorneys are entitled to reasonable fees for their services. [3]

As and For a Second, Separate and Distinct Cause of Action, plaintiff complains of defendant and for cause of action alleges:

I.

Plaintiff hereby incorporates paragraphs I through V, VII, VIII and X of her first cause of action in this, her second cause of action, as fully as though set forth herein at length.

II.

That on or about the 31st day of December, 1947, said Lawrence C. Reed authorized deductions from his retirement pay to commence on the 31st day of January, 1948.

III.

That all conditions precedent to the maintenance of Policy #N 10 815 106 have been fulfilled.

As and For a Third, Separate and Distinct Cause of Action, plaintiff complains of defendant and for cause of action alleges:

I.

Plaintiff herewith incorporates Paragraphs I, II, III, IV, V, VI, VII, VIII, IX and X of her first cause of action in this, her third cause of action, as fully as though set forth herein at length.

II.

That at all times subsequent to December 31, 1947, and prior to the 6th day of February, 1949, defendant, through its agents, servants and employees acting in the course and scope of their said agency and employment, acted in such a manner as to induce said Lawrence C. Reed to believe that insurance policy #N 10 815 106 was in full force and effect.

III.

That had Lawrence C. Reed been informed that said policy was not in effect, he would have had the right to reinstate it at any time prior to his death. [4]

IV.

That the acts of defendant's agents, servants and employees as set forth herein damaged the plaintiff in the sum of \$10,000.00.

Wherefore, plaintiff prays judgment:

1. The above-entitled court declare that plaintiff is entitled to the full benefits due under Policy

#N 10 815 106 in the sum of \$10,000.00 in accordance with the terms of said contract of insurance.

2. The above-entitled court determine that said contract of insurance was in full force and effect on the 16th day of February, 1949.

3. Or, in the alternative, that the above-entitled court determine that defendant is liable to plaintiff in the sum of \$10,000.00 by reason of the acts set forth above.

4. A reasonable fee be paid to plaintiff's attorneys for the prosecution of this action.

DAVID S. CASEY and

CHARLES ELWYN KARPINSKI,

/s/ By CHARLES ELWYN KARPINSKI,

Attorney for Plaintiff

[5]

Duly Verified. [6]

[Endorsed]: Filed Sept. 23, 1954.

[Title of District Court and Cause.]

ANSWER

In answer to plaintiff's Complaint on file herein, the defendant, United States of America, admits, denies and alleges as follows:

I.

The defendant admits the allegations contained in the first paragraph of plaintiff's First Cause of Action.

II.

The defendant admits the allegations contained in Paragraph II of the First Cause of Action.

III.

The defendant admits the allegations contained in Paragraph III of the plaintiff's First Cause of Action.

IV.

The defendant admits the allegations contained in Paragraph IV of the plaintiff's First Cause of Action. [7]

V.

The defendant denies the allegations contained in Paragraph V of plaintiff's First Cause of Action, and defendant alleges that it was never authorized by anyone to deduct premiums for National Service Life Insurance Policy No. N 10 815 106 from the retirement pay of Lawrence C. Reed.

VI.

The defendant denies generally and specifically each and every allegation contained in Paragraph VI of plaintiff's First Cause of Action, and alleges that National Service Life Insurance Policy No. N 10 815 106 lapsed for non-payment of premium due February 1, 1948.

VII.

The defendant admits the allegations contained in Paragraph VII of plaintiff's First Cause of Action.

VIII.

The defendant admits the allegations contained in Paragraph VIII of the plaintiff's First Cause of Action except that it denies that any evidence was submitted which established the plaintiff's rights to the proceeds of National Service Life Insurance Policy No. N 10 815 106.

IX.

The defendant admits the allegations contained in Paragraphs IX and X of plaintiff's First Cause of Action.

In Answer to Plaintiff's Second Cause of Action, the Defendant United States of America, Admits, Denies and Alleges as Follows:

I.

The defendant hereby incorporates its answers to Paragraphs I, II, III, IV, V, VII, VIII and X of plaintiff's First Cause of Action in this, Second Cause of Action, as fully as though set [8] forth herein at length.

II.

The defendant denies each and every allegation contained in Paragraphs II and III of plaintiff's Second Cause of Action.

In Answer to Plaintiff's Third Cause of Action, the Defendant United States of America, Admits, Denies and Alleges as Follows:

I.

Defendant hereby incorporates its answers to Paragraphs I, II, III, IV, V, VI, VII, VIII, IX and X of plaintiff's First Cause of Action to this, Third Cause of Action, as fully as though set forth herein at length.

II.

The defendant denies each and every allegation contained in Paragraphs II, III, and IV of plaintiff's Third Cause of Action.

Wherefore, the defendant prays for judgment as follows:

1. That the plaintiff take nothing by her Complaint on file herein;
2. That the defendant be allowed its costs; and
3. For such other and further relief in the premises as may be meet and just.

LAUGHLIN E. WATERS,
United States Attorney

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division

/s/ ANDREW J. DAVIS,
Assistant U. S. Attorney,

Attorneys for Defendant

[9]

Demand For Jury Trial

Comes Now the defendant, United States of America, and makes demand for jury trial herein by and through its attorneys.

LAUGHLIN E. WATERS,
United States Attorney

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division

/s/ ANDREW J. DAVIS,
Assistant U. S. Attorney,

Attorneys for Defendant [10]

Affidavit of Service by Mail Attached. [11]

[Endorsed]: Filed March 1, 1955.

[Title of District Court and Cause.]

PRE TRIAL ORDER

The case has been set for trial July 26th at 10 A.M., at San Diego.

The parties will confer together and prepare a pre-trial stipulation, in substantially the following form:

Sec. 1. The admissions of fact from the pleadings, and such additional facts as the parties are able to agree to.

Sec. 2. A statement of the issues of fact and the

issues of law that remain to be tried. The court desires the parties to agree to these issues, if at all possible. If one party proposes an issue which the other party denies as an issue, it will have to be listed as the issue of fact or law to be tried. The court does not desire the parties to separately list their idea of the issues of law and fact.

Sec. 3. Will contain any miscellaneous stipulations entered into, and a list of the documentary evidence in the case, together with reservation of any particular objection which the party desires to make at the trial. The parties will exhibit their documentary evidence one to the other, and attempt as far as possible, to limit or waive their objections. [12]

Plaintiff will have the responsibility of preparing the pre trial stipulation, and it will contain a place for the court to sign and approve it.

Each party will prepare a trial memorandum, with emphasis on the unusual or important questions of law in the case.

The pre trial stipulation and the trial memorandums to be filed on or before Friday, July 15th, 1955.

Dated: June 6, 1955.

/s/ JAMES M. CARTER,

U. S. District Judge

[13]

[Endorsed]: Filed June 8, 1955.

[Title of District Court and Cause.]

SUPPLEMENTAL STIPULATION OF FACTS

It Is Hereby Stipulated by and between counsel for the respective parties hereto that the Stipulated Facts heretofore signed by the parties and filed with the Court shall be supplemented and corrected in that Fact No. 4 appearing on page 2 of the Stipulated Facts applies only to a Designation of Mildred Reed Wood as the beneficiary of a retirement and disability fund that Lawrence C. Reed had acquired under the jurisdiction of the Civil Service Commission. The Designation of Mildred Reed Wood as the beneficiary of such fund had nothing to do with, and was in no way connected with, any government life insurance and was not directed to the Veterans Administration.

Dated: This 25th day of August, 1955.

LAUGHLIN E. WATERS,

United States Attorney

MAX F. DEUTZ,

Asst. U. S. Attorney,

Chief of Civil Division

/s/ ANDREW J. DAVIS,

Assistant U. S. Attorney,

Attorneys for Defendant [31]

DAVID S. CASEY and

CHARLES ELWYN KARPINSKI,

/s/ By CHARLES ELWYN KARPINSKI,

Attorneys for Plaintiff [32]

[Endorsed]: Filed Aug. 30, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT and CONCLUSIONS OF LAW

The above entitled matter came on regularly for trial on July 26, 1955 before the Honorable Jacob Weinberger, Judge Presiding without a jury, plaintiff being represented by her attorney, Charles E. Karpinski, and the defendant being represented by its attorneys, Laughlin E. Waters, United States Attorney, Max F. Deutz and Andrew J. Davis by Andrew J. Davis, Assistant U. S. Attorneys, and on that date the matter being continued for further argument and submission which was had on September 16, 1955, and the Court, considering the evidence submitted and the arguments of counsel both written and oral, and being fully advised in the premises, hereby makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

The Court has jurisdiction over the within action and the parties pursuant to the National Service Life Insurance Act of 1940 as amended, (38 U.S. C.A. 445, 551, 817). [37]

II.

On June 1, 1943, while Lawrence C. Reed was in active service in the United States Army, he applied for and was issued National Service Life In-

surance Policy No. 10 815 106, which policy named as beneficiary the plaintiff, who was the sister of said Reed.

III.

During the period of said Reed's active service in the Army, the premiums for said policy were deducted by the United States from his active service pay, by a "Class N" allotment.

IV.

Lawrence C. Reed retired from active service in the United States Army on December 31, 1947.

V.

On December 31, 1947, the Army regulations then in force for regular Army personnel, a class into which Lawrence C. Reed belonged, were as follows:

"CFR Title 10-Army: War Department Section 308.10

(e) When a member of the regular Army is retired, he may, if he desires, continue Class E Allotments for commercial life insurance and also Class D & N Allotments. In such a case no action is necessary on the part of the allotter. If such Class E allotments or Class D or N allotments are to be discontinued, a WD AGO form 141 will be processed for each separate allotment."

VI.

At the time of his retirement, Lawrence C. Reed signed a form provided by the United States (Exhibit 1) entitled "Enlisted Record and Report of

Retirement". That in a space on said form headed "Insurance Notice", and opposite section [38] numbered "53" and opposite the words "Intention of Veteran to Continue Payment Deducted From Retirement Pay" there was typed an "X".

VII.

Subsequent to Lawrence C. Reed's retirement from the United States Army, he received his full retirement pay each month, and no deductions were made for payments of the premium on said insurance policy.

VIII.

Lawrence C. Reed died February 6, 1949.

IX.

Subsequent to the death of Lawrence C. Reed, the plaintiff duly made claim in writing to the defendant for the death benefits under the said life insurance policy. The plaintiff's claim was disallowed by the Veterans Administration, an agency of the defendant, on the 4th day of August, 1949, which decision was affirmed by the Board of Veterans Appeals on October 31, 1950.

Conclusions of Law

I.

The Court has jurisdiction over the subject matter of the action and of the respective parties.

II.

The insurance policy involved herein was in full

force and effect on the date of the retirement of Lawrence C. Reed from the United States Army, December 31, 1947.

III.

The said insurance policy lapsed because of non-payment of premiums due January 1, 1948, and at the time of the death of said Lawrence C. Reed, said policy was not in force. [39]

IV.

Judgment should be entered in favor of the defendant.

Dated this 18 day of November, 1955.

/s/ JACOB WEINBERGER,
United States District Judge.

[Endorsed]: Filed Nov. 18, 1955. [40]

United States District Court, Southern District
of California, Southern Division

No. 1656-SD Civil

MILDRED REED WOOD,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The Court being fully advised in the premises, and having heretofore signed and filed its Findings of Fact and Conclusions of Law,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

That judgment be entered in favor of defendant and against the plaintiff dismissing plaintiff's complaint and denying the relief prayed for therein.

Dated: This 18th day of November, 1955.

/s/ JACOB WEINBERGER,
Judge, U. S. District Court.

Presented by:

LAUGHLIN E. WATERS,
United States Attorney.
MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division.

/s/ ANDREW J. DAVIS,
Assistant U. S. Attorney.
Attorneys for Defendant. [41]

Docketed and Entered Nov. 22, 1955.

[Endorsed]: Filed Nov. 18, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the United States of America and to Laughlin
E. Waters and Andrew J. Davis, its attorneys:

You and each of you will take notice that Mildred
Reed Wood, plaintiff above named, hereby appeals
to the United States Court of Appeals for the
Ninth Circuit from the judgment entered in this
action on the 18th day of November, 1955.

/s/ CHARLES ELWYN KARPINSKI,
Attorney for Plaintiff. [42]

Affidavits of Service Attached. [43-4]

[Endorsed]: Filed Jan. 18, 1956.

[Title of District Court and Cause.]

STATEMENT OF POINTS

The points on which Appellant will rely on ap-
peal are:

1. The Court erred in refusing to enter a verdict
for the plaintiff for the relief prayed.

2. The Court erred in adopting the conclusion
that under no circumstances could the United States
of America be found in effect to be estopped to pro-
test the non-payment of premiums when the fault

was due entirely to the negligence or error of the United States of America or its agents.

/s/ CHARLES ELWYN KARPINSKI,
Attorney for Plaintiff.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Jan. 18, 1956. [45]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Pursuant to Rule 75 (A) in the Federal Rules of Civil Procedure, the plaintiff appellant hereby designates for inclusion in the record of appeal to the United States Court of Appeals for the Ninth Circuit, taken by Notice of Appeal filed January 17, 1956, the following portions of the records, proceedings and evidence in this action:

1. Complaint
2. Pre-trial Order
3. Answer
4. Pre-trial Stipulations
5. Stipulated Facts (a document) and Supplemental Stipulation
6. Summary of facts prepared by attorneys for defendant
7. Plaintiff's opening brief
8. Defendant's brief

9. Plaintiff's closing brief [47]

10. All documentary evidence introduced at the trial, particularly deceased's discharge, etc.

11. Judge's memorandum opinion

12. Findings of fact and conclusions of law

13. Plaintiff's objections to defendant's Findings of Fact and Conclusions of Law

14. Amended Findings of Fact and Conclusions of Law and Judgment.

It is hereby stipulated by and between the parties, by their respective counsel, Charles Elwyn Karpinski as counsel for plaintiff and appellant, and Laughlin Waters and Andrew J. Davis as counsel for defendant appellee, that designation of the contents of the records on appeal are the only things that need be considered by the Appellate Court.

/s/ CHARLES ELWYN KARPINSKI,
Attorney for Plaintiff Appellant.

LAUGHLIN E. WATERS and
ANDREW J. DAVIS,

/s/ By ANDREW J. DAVIS,

Attorneys for Defendant and
Appellee [48]

[Endorsed]: Filed Feb. 24, 1956.

[Title of District Court and Cause.]

MOTION FOR EXTENSION OF TIME
AND ORDER

Charles Elwyn Karpinski, attorney for plaintiff and appellant in the above entitled action, moves the Court to grant an extension of time in which to file and docket the record on appeal in this matter due to the following facts: the necessity for me to be in Mariposa County for a trial in the Superior Court of that County; and the fact that on January 17, 1956, the designation of contents of record on appeal was sent to Andrew J. Davis, Attorney for defendant and appellee, for his signature which was returned to my office in the morning of February 23, 1956, and therefore said designation of contents of record on appeal could not be filed with this Court in sufficient time for the preparation of the record on appeal.

It is therefore prayed that the Court extend the period for filing on appeal up to and including the 16th day of April, 1956.

Respectfully submitted,

/s/ CHARLES ELWYN KARPINSKI

ORDER EXTENDING TIME

It Is Hereby Ordered that the time for filing and docketing the record on appeal be, and the same is extended to and including the 16th day of April, 1956.

Dated: This 24th day of February, 1956.

/s/ JACOB WEINBERGER,

Judge of the District Court [50]

[Endorsed]: Filed Feb. 24, 1956.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 50, inclusive, contain the original

Complaint;

Answer;

Pre-Trial Order;

Trial Memorandum;

Plaintiff's Opening Brief;

Defendant's Reply Brief, Summary of Facts;

Supplemental Stipulation of Facts;

Plaintiff's Cross-Brief;

Plaintiff's Objections to Defendant's Findings of Fact and Conclusions of Law;

Findings of Fact and Conclusions of Law;

Judgment;

Notice of Appeal;

Affidavit of Jean Harrison;

Affidavit of Robert J. Miller;

Statement of Points;

Designation of Contents of Record on Appeal;
Motion for Extension of Time;

which, together with plaintiff's exhibit 1 and joint exhibit 3 and original copy of Findings of Fact and Conclusions of Law that was lodged on November 10, 1955, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above case.

I further certify that the foregoing record was prepared at expense of \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of the said District Court this 18th day of April, 1956.

[Seal] JOHN A. CHILDRESS,
 Clerk
 /s/ CHARLES E. JONES,
 Deputy

[Endorsed]: No. 15118. United States Court of Appeals for the Ninth Circuit. Mildred Reed Wood, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed: April 19, 1956.

Docketed: May 1, 1956.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit

No. 15118

MILDRED REED WOOD, Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

STIPULATION

It is hereby stipulated by and between Charles Elwyn Karpinski, attorney for Appellant, and Laughlin E. Waters, United States Attorney, by Andrew J. Davis, Assistant United States Attorney, attorneys for Appellee, that the appellant's State-ments of Points and Designation of Contents of Rec-ord On Appeal heretofore filed by appellant and appearing in the typewritten record, be adopted as it appears in the typewritten record.

Dated: This 16th day of May, 1956.

/s/ CHARLES ELWYN KARPINSKI,
Attorney for Appellant

LAUGHLIN E. WATERS and
ANDREW J. DAVIS,

/s/ By ANDREW J. DAVIS,
Attorneys for Appellee

[Endorsed]: Filed May 23, 1956. Paul P. O'Brien,
Clerk.

United States Court of Appeals

FOR THE NINTH CIRCUIT

MILDRED REED WOOD,
Appellant,
vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court
for the Southern District of California,
Southern Division

BRIEF FOR APPELLANT

MILDRED REED WOOD

DAVID S. CASEY and
CHARLES ELWYN KARPINSKI
640 San Diego Trust & Savings Bldg.,
San Diego, California

Attorneys for Appellant

FILED

SEP 14 1950

PAUL R. O'BRIEN, CLERK

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No. 15118

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MILDRED REED WOOD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the
Southern District of California, Southern Division

BRIEF FOR APPELLANT MILDRED REED WOOD

STATEMENT

This is an appeal by Lawrence Gray, Administrator, CTA of the estate of the plaintiff, Mildred Reed Wood, now deceased*, the beneficiary under a National Service Life Insurance Policy #N 10 815 106, from a judgment for the defendant rendered in the United States District Court, Southern District of California, Southern Division, on the 18th day of November, 1955. The verdict by the judge was based upon the stipulated facts and the evidence

adduced at the trial.

The essential facts as stipulated were that the action was brought under the National Life Insurance Act of 1940, as amended; the plaintiff was the duly designated beneficiary; and the face amount of the policy was \$10,000. That from the 1st day of June, 1943 until the 31st day of December, 1947, the United States Government had deducted from the pay of Lawrence C. Reed, then in the regular army of the United States, the necessary premium payments on said insurance. That on or about the 31st day of December, 1947, said Lawrence C. Reed retired from the United States Army at the post of Corozal, Canal Zone. The Army Regulations then in force for regular Army personnel, a class in which Lawrence C. Reed belonged, were as follows:

"CFR Title 10 - Army: War Department Section 308.10

(e) When a member of the regular army is retired, he may, if he desires, continue Class E allotments for commercial life insurance and also Class D & N allotments. In such a case no action is necessary on the part of the allotter. If such Class E allotments or Class D or N allotments are to be discontinued, A WD AGO Form 141 will be processed for each separate allotment. "

The allotment in question was a Class N allotment. Lawrence Reed died on the 6th day of February, 1949 in the Canal Zone. The plaintiff in conformance with all requirements, made a claim in writing to the United States of America for payment of death benefits under the said policy, which claim was disallowed on Aug. 4,

1949, and the Board of Veterans Appeals on Oct. 31, 1950 denied the appeal from the ruling of the Veterans Administration. It was further stipulated that no deductions were in fact made from Reed's retirement pay for the premiums, although no notice was ever sent to Reed to that effect by any governmental agency. At the time Reed retired he signed a form entitled "Enlisted Record and Report of Retirement". In a space on said form headed "Insurance Notice" opposite the words "intention of Veteran to Continue Payment Deducted from Retirement Pay", there was typed an X. The form also showed that the premium due each month was \$9.90. No evidence was introduced at the trial on behalf of the defendant. In summary then, Reed's policy was in full force and effect until he retired; when he retired he authorized the Government to deduct premiums from his retirement pay; the government failed to do so, although there was at all times sufficient money due Reed to meet the premiums, that there is no indication that Reed either knew or did not know that the premiums were not being deducted.

QUESTION INVOLVED

The question is simply whether or not the policy of insurance lapsed for non-payment of premiums. To determine this question, a determination of the status of a National Service Life Insurance policy must be made; it must be decided whether the law applicable to private insurance companies is applicable to this type of policy, and if so, what such law is. If the usual law is not applicable, then the question is what particular law is applicable to this specific type of policy.

ARGUMENT

I.

THE COURT ERRED IN REFUSING TO ENTER
A VERDICT FOR THE PLAINTIFF
FOR THE RELIEF PRAYED

There have been numerous cases decided under the National Service Life Insurance Act, and a great number of them may, in the final instance, be reduced simply to the question of whether or not the policy is forfeited under a variety of facts for non-payment of premium. The cases in the various District Courts, Circuit Courts, and even rulings on applications for certiorari, do not appear at first blush to be harmonious. However, upon careful analysis of the individual cases, a basis for distinction, upon which most of the decisions may be reconciled, is herewith submitted for the court's consideration.

1st Circuit

U.S. vs. Le Page, (1932) 59 F(2d) 165 - 1st Circuit

In this case, no premiums had been paid on the policy due to a ruling of the Government that the insured had not ratified the policy before the expiration of the time allowed by law. The court held as to the construction of the contract, that it should be liberally construed for the insured, and that the fact that no premiums were paid on the policy was not the fault of the insured. The government at all times had sufficient money due the insured to have paid the premium. The court relied on the O'Neill case, *infra*. The First Circuit thus adopts the non-forfeiture rule.

3d Circuit

U. S. vs. Loveland 25 F (2d) 447 - 3d Circuit

In this case the government had failed to answer letters of inquiry concerning the date premiums were due, and the insured knew that the premiums had not been paid. The plaintiff argued the failure of the government to answer the letters estopped it to deny liability. The court held that those facts alone did not estop the government. In line with the other cases cited herein the court said a servant of the government has no power to bind the United States by acts not authorized by law. The case was reversed on confession of error. This case follows the other Circuits in cases where estoppel based on negligence of a servant, outside the scope of his authority where no forfeiture is involved, is considered.

4th Circuit

U. S. vs. Morrell (1953) 204 F (2d) 490 (Cert. denied 346 US 875)

This appears to be a landmark case in this field, and is cited as authority by many courts. In this case a captain was disabled for a period during which premiums on his National Service policy was waived by statute. After the disability had ceased to exist, the insured failed to pay the premiums, and the government claimed the policy had lapsed for non-payment. The Veterans Administration held funds due the insured, which had accumulated in his account by virtue of his waiver due to disability. The court in deciding this case followed the rule which appears to bring into harmony the other decisions involving this question.

The court said "an insurer is not justified in declaring a forfeiture of an insurance policy for non-payment of premiums when at the time the premiums accrue, the insurer is indebted to the insured either for dividends declared, or other funds belonging to the insured which it may have in its hands." The court also held that the rule as generally stated pertaining to private insurance contracts outlining a policy against enforcement of unnecessary forfeitures of contracts of insurance was equally applicable against the United States, under the National Service Life Insurance Act of 1940. As noted above, the United States Supreme Court denied certiorari in this case.

Mikell vs. United States 64 F (2) 301 - CCA 4th Circuit

In this case, the plaintiff contended that the policy did not lapse for non-payment of premiums because the U.S. Government held funds due the soldier for an increase in rank, which increase was never paid to insured. The court apparently agrees with the plaintiff in this case as to the law, but disagrees as to the facts. The court held that the insured had not specifically directed the government to apply the funds to the payment of premiums, nor was there sufficient funds with which to pay the premiums to the time of death of insured. The Morrell case decided later in this same circuit therefore appears to be in harmony with this case, since in the instant Mikell case, it appears that the court would have held for the plaintiff if the insured had directed the funds to be applied to payment of premiums and there had been sufficient funds, notwithstanding the fact that the government failed to actually make the deductions for that purpose. The court cites the case of Mortek vs. U.S. 297 F 485 in the district court of Illinois, in which case the court held a policy could not lapse so

long as the government owed to the soldier as service pay an amount sufficient to pay the premiums as they became due and according to the plain language of the regulations, which are a part of the contract, and premiums must be treated as paid whether or not deductions are in fact made if upon the date the premiums are due, the government owes to the soldier an amount sufficient to pay the premiums. They further said it did not matter whether the soldier was on active duty or had been discharged.

The court very plainly stated its version of the law when it said "When the government goes into the business of insurance, it is permissible to apply to it the rules applicable to insurance companies so far as transactions relating to insurance are concerned, but no farther."

5th Circuit

Kubala vs. U.S. 210 F (2d) 943 5th Circuit, 1954

The insured had been discharged, but having been disabled for 1 year, his premiums were waived; however, he paid the premiums during the waiver period (disability was established after he had already paid the premiums). The total amount of premiums paid during disability was \$66.60, which was sufficient to pay premiums up to time of death. The Veterans Administration did not apply the funds to the payment of premiums which the insured subsequently failed to pay. The court held the Veterans Administration should have applied the funds to prevent a forfeiture of the policy. The court said in paragraph 4, "We have recognized and enforced the proposition that because of the nature and terms of

the insurance granted, the contract of insurance in effect consists of the policy as controlled by the language of the statute authorizing it and valid regulations issued pursuant to the statute. Thus, in many aspects of the matter there comes into play the sovereign capacity which underlies many official acts of omission, as well as commission, in the carrying out of this insurance program. This is particularly applicable in matters such as estoppel and waiver which are generally held not to be effective as against the United States, and as to these the United States is not bound by the same principle which bind commercial carriers." . . . "But this is not to state that equitable considerations have no place in the administration of the National Service Life Insurance program when their operation does not run counter to the statute or regulations." (Citing Lewis case, *infra*.)

U.S. vs. Lewis, 202 F (2d) 102 (1953) 5th Circuit

A Veterans Administration officer erroneously wrote insured that his policy was paid up until 1955, when in fact it was paid up only until 1940. The plaintiff argued that the letter set up an estoppel of the U.S. Government. The court held that inasmuch as the employee had no authority to extend the insurance beyond that authorized by law, there was no estoppel. In this case the court specifically held, as it later did in the Kubala case, *supra*, that an act by a government employee, NOT AUTHORIZED BY REGULATION OR STATUTE, would not bind the government. The court as stated, held the converse in the Kubala case, that an act by an employee WHICH WAS AUTHORIZED BY REGULATION would be binding on the government. The Lewis case was cited as authority for the Kabala case.

The Fifth Circuit also decided in 1952 the case of Siller vs. United States, 195 F (2) 195 involving non-payment of premiums, but the question was whether or not the insured had complied with the procedure for reinstatement, and it was held he did not. The only pertinent decision made in this case (not involving specific questions of reinstatement) was that the burden of proving the non-payment of premiums was on the defendant and not on the plaintiff.

8th Circuit

U.S. vs. Griffin, 216 F (2d) 217 Cert. Denied 348
U.S. 927

Insured went A.W.O.L., his premiums were not paid while he was absent, and his life insurance policy lapsed for nonpayment of premiums. The army regulation provided that pay should cease during the absence without leave of a soldier. The court held that the policy had lapsed, but in so holding distinguishes the case from the Morell case, supra, in that in the Griffin case, the government apparently did not have funds from which to deduct the premiums since all pay by regulation ceased upon the unauthorized absence of the soldier. Therefore, this case seems to lay down the same law, but distinguishes the facts from the cases that might otherwise seem to be contra thereto.

9th Circuit

McIndoe vs. U.S. 194 F (2) 602 CCA 9th Circuit, 1952

Insured had received letter erroneously stating there was credit to pay premiums, and in reliance

thereon, failed to pay them. The court held that the United States may not be estopped to assert any defense available to it. In this case, of course, the government did not owe the insured any money, and the facts were, as in the Kubala and Lewis cases, supra, the plaintiff was relying merely on an act of a government employee not authorized by statute or regulation. This seems to be consistent with the other cases.

Bouvier vs. U.S. , 214 F (2) 329 9th Circuit

That the Ninth Circuit Court of Appeals is in harmony with the other circuits on the principle laid down in the Morrell case that the policy of the law is against the declaration of a forfeiture of a policy, even as to the United States, is firmly settled in the Bouvier case, ending any controversy a misconstruction of the McIndoe case might lead to. In the Bouvier case the government had sufficient funds to pay the premium on one policy of insured, but not on both. Instead of applying all the funds to either, the government argued both had lapsed, since they had applied a portion of the funds to each policy for a certain period of months. The court said "Where necessary to apply payment made on behalf of the holder of two national service policies to the payment of the next two monthly premiums on one of the policies as to which insured had filed application for renewal in order to keep both policies in force to date of insured's death, payment must be treated as so applied, even though actually applied as one monthly premium on each policy. ". . . . "where the Act (National Service) is open to construction, it is liberally to be construed in favor of the soldier. . . Where there is no express provision of the act preventing the application of the amounts of the insured's money held by the insurer to prevent a

forfeiture the general rule applies that an insurer should act to prevent forfeiture". Citing American National Co. vs. Yee Lim See 104 F (2d) 688, 694. The court further added "In so holding we are in accord with the 4th Circuit in U. S. vs. Morell, 204 F2d 490 and the Fifth Circuit in Kubala vs. U.S. 210, F2d 943, 945, both cases holding on similar policies that such duty to prevent a forfeiture in no way involved the contention presented by the insurer that so to hold constituted an estoppel against the government."

10th Circuit

Unger vs. U. S. 65 F (2d) 946 10th Circuit

In this case the premiums were deducted from the soldier's pay during his first enlistment, but the government, although authorized to do so, failed to deduct them during the period of reenlistment. The court in holding for the plaintiff stated that the knowledge of the serviceman as to whether deductions were in fact made was not important. They stated that as long as the government owed the soldier money each month for his pay, the policy could not lapse. They cite with approval the Mortek and Lewis cases, supra.

District Court Cases

Crawford vs. U. S. 291 F 801. The court accepts the premise that if the government owes money to insured, the policy of insurance cannot lapse for non-payment of premiums, but the question in this case was whether the term "pay" as used in the War Risk Act included annual retainer for reserve. The court held it did not. However, the court is in agreement with the principle

against forfeiture where funds were available, whether or not applied to pay premiums.

O'Neill vs. U.S. Dist. Ct. of Mass., 32 F (2d) 313

The premiums were deducted during soldier's first enlistment, but the army failed to deduct them on the second enlistment. At the time of the death of insured the government owed him the service pay that had accrued to him for the current pay period, which was sufficient to pay all back premiums. The court held that in view of the army regulations and acts of Congress, since the government owed the soldier his service pay, the insurance could not be forfeited. They said "To hold that the insurance has lapsed for non-payment of premiums is not only to overlook the manifest intention of the regulations which determine the rights of the parties, but also to enable the government to profit by its own default much to the detriment of an innocent beneficiary. Such a result must inevitably lead to the conclusion that the government is now estopped from availing itself of the defense which it has seen fit to set up to this petition." The court distinguishes the facts in this case from those in the Mikell case.

Burk vs. U.S. 133 Supp. 63, Dist. Ct. of Arkansas (1955)

Insured had dividend credits which plaintiff argued should be applied to the payment of premiums to prevent a forfeiture under the rule laid down in the Morell case. Court held that although otherwise proper, the dividends could not be so applied since they became payable on the date of the insured's death, and secondly the statute

concerning such dividends specifically provides that dividends may be applied to premiums on written authority so to do and here no such authority existed. This case follows the theory that moneys due insured should be applied to payment of premiums to prevent a forfeiture unless to do so would be contrary to law, and the court here holds it would be contrary to law under the facts in this case, so to do. The court specifically cites the Morrell case and distinguishes subject case on its facts.

Kalter vs. U.S. 130 F. Sup. 79, Dist. Court of N. Y. 1955

Upon the army discharge of insured, a personnel officer made a notation that the insurance premiums were due on the 31st of the month, when they in fact were due at an earlier date. The only question raised by the court was whether or not the personnel officer's statement effected an amendment of the original contract. The court's answer was that an agent of the United States has no power to enter into an agreement not authorized by law.

Ping vs. U.S. Dist. Ct. of Michigan, 105 F. Supp. 843 (1952)

Although the facts are not too clear, apparently the insured paid a premium in May, then paid another premium in August. The Government employee erroneously gave him a receipt in August indicating the insurance was still in full force and effect. The Court said "It is the universal rule that a beneficiary of an insurance policy has established a prima facie case when the policy naming the plaintiff as beneficiary and

proper proof of death of the insured have been introduced in evidence." . . . "Various laws under which War Risk and other veterans' insurance plans are administered, to the extent that they are applicable, supercede the pertinent law previously in force. If Congress has not spoken the law must be learned from other sources." In answer to the Government's argument that the United States could not be estopped, the court merely indicated such doctrine was not applicable.

United States Supreme Court

Smith vs. United States, 292 U.S. 337 - 1934

During the insured's first enlistment he signed an authorization for the premiums to be deducted from his service pay. Upon his reenlistment, he did not sign such authorization. The Supreme Court held there was sufficient evidence to show an abandonment of the contract by the assured. The Court therefore appears to merely determine the intent of the parties as a matter of fact. Inasmuch as the Supreme Court decided this case in 1934, and subsequently in 1953 denied certiorari in the Morrell case, it is submitted the cases are distinguishable on their facts. To the extent that they cannot be reconciled, it is assumed the Morrell case overrules the Smith case.

After reveiwing all the cases, it appears that the decisions may be reconciled by dividing them into two distinct classes into which they appear to naturally and logically fall: (I) Those in which the courts hold that the government may not be bound by some negligent act of an agent NOT AUTHORIZED BY LAW. Examples are misquoting dates of premiums (Kalter vs. U.S., supra)

failing to answer letters regarding status of insurance (U. S. vs. Loveland, supra), erroneously advising insured he had sufficient credits to pay premiums (McIndoe vs. U.S., supra), and others cited. (II) Those cases in which the courts invoke the principle against forfeiture, or in effect hold that the government has waived the premiums, and in which it has failed to do some act, which WAS AUTHORIZED BY LAW. Examples are failing to deduct premiums from service pay where such deduction had been authorized by insured (O'Neill vs. U.S., supra, and Unger vs. U.S., supra), crediting payments to wrong policy (Bouvier vs. U.S., supra), and all the cases cited wherein the government failed to apply funds for payment of premiums.

Upon such a classification of the cases, it will be seen that there exists little conflict in the law as applied, but that on the contrary the law is uniform when the proper principle is applied to the proper set of facts. Only the facts differ, the law is uniform. This law as universally followed by the courts then is that where the government by its erroneous, and unauthorized, usually overt actions, has caused the insured to be misled into permitting his insurance to lapse, the government is not bound by the actions of its agent in such unauthorized actions. Simply, it is a question of agency, where the agent has acted outside the scope of his authority. Although some courts do discuss estoppel, most of the decisions seem to be on the agency principle. On the same agency theory, the courts hold that where the agent has authority to do the act generally, or where he was acting within the scope of his authority, but acted erroneously, the government is nevertheless bound by his actions. This does not appear to be applying any different rules to

insurance cases than is applied to any other subject matter, involving the agency principle. Superimposed upon the agency theory is the principle against forfeitures which is applied everywhere in the law.

Applying the above law to the facts in the appellant's case, it appears that such facts fall into the second class of cases, and further the elements invoking the doctrine against forfeiture are also present. The National Service Life Insurance Act of 1940 grants the agents enforcing the act the authority to deduct the premiums from the retirement pay of insured, (R 15) if the serviceman so desires. The insured, Reed, desired to have the premiums deducted from his retirement pay and authorized the government to do so. (R 15, Exhibit 1). Therefore, it was clearly within the scope of the authority of the government agents to deduct the premium. Under no theory can the principal avoid liability for the acts of his agent in such case. In addition to the foregoing, since at all times when the premium fell due on insured's policy the insurer had funds in its hand to the credit of the insured, the insured could not permit the insurance to lapse, thereby causing a forfeiture. (O'Neill vs. U.S., supra, Unger vs. U.S., supra, Bouvier vs. U.S.) and others cited. In answer to the question raised by the United States Supreme Court in the Smith case, supra, as to the intent of the parties to abandon the policy of insurance, attention is directed to the Army Regulation in force regarding discontinuance of allotments (R 15). CFR Title 10-Army provides that only if the allotment for the payment of premiums is to be DISCONTINUED, then WD AGO form 141 will be processed. The fact that neither the government nor the insured caused such form to be filed is clear refutation of any intention on the part of either

party to abandon the contract.

In summary, therefore, based upon the law as laid down in the Federal Courts, together with the similarity of facts in the present case as compared with such decided cases, it seems conclusive that the trial court erred in refusing to enter a verdict for the plaintiff for the relief prayed.

II

THE COURT ERRED IN ADOPTING THE CONCLUSION THAT UNDER NO CIRCUMSTANCES COULD THE UNITED STATES OF AMERICA BE FOUND IN EFFECT TO BE ESTOPPED TO PROTEST THE NON-PAYMENT OF PREMIUMS WHEN THE FAULT WAS DUE ENTIRELY TO THE NEGLIGENCE OR ERROR OF THE UNITED STATES OF AMERICA OR ITS AGENTS.

This point has been covered in the preceding discussion of the facts in the instant case and the law promulgated by the various Federal Courts. However, it should be pointed out that the use of the rather loose legal term "estoppel" by the courts has led to some confusion. If estoppel is held to include those situations wherein an agent creates liability on behalf of his principal through some act of commission or omission within the scope of his authority, then clearly the majority of the cases hold that estoppel in that sense may be invoked against the United States. However, although some of the courts have alluded to "estoppel" most recognize that the term should be correctly applied in such instances only where the United States might otherwise be "estopped" to deny that an agent has acted

outside the scope of his authority. There appear to be no cases on record where such a fact situation has been clearly presented for decision. Dicta indicates that in such a situation the United States because of its peculiar legal status could not be "estopped" to deny the authority of its agent. This seems to be a logical conclusion to reach, since the United States is a creation of the Constitution, and can act only within limits. The Federal government can do only such acts as empowered by a specific law to do. What the United States as principal cannot do, obviously it cannot authorize an agent to do. To permit unauthorized acts of agents to bind the government would be broadening the powers of the government without legislative enactment. However, to hold the United States is bound by acts committed or omitted by an agent, such acts being authorized by law, does not involve the same argument. The reasons for forbidding the government to be estopped in the one case, are entirely absent in the second. Thus in the subject case, whether it is held the government as principal is bound on a theory of estoppel, or on the theory of agency appears academic. It is believed, however, that the decisions correctly hold that the less tortuous theory is that of agency. As pointed out at the trial, all the elements of estoppel appear to be present. The government does not argue that the elements are not present, but rather that estoppel may not be applied against the United States. All the elements being present, the reasons upon which the prohibition against use of estoppel being absent, no argument can be contrived upon which it could not be invoked.

CONCLUSION

The cases bearing on this question have been analyzed with all objectivity. Based upon this analysis, it strongly appears that the only decision that could have been reached by the trial court in this case, in the interest of harmonious Federal law, was for the plaintiff as prayed.

Respectfully submitted,

David S. Casey and
Charles Elwyn Karpinski

By Charles Elwyn Karpinski

*Due to various complications, not material here, the actual appointment of Lawrence Gray as Administrator, CTA, of the estate of Mildred Reed Wood will not occur until the 28th day of September, 1956, but counsel has been authorized by all parties in the estate matter to proceed with the brief.

Charles Elwyn Karpinski

No. 15118

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MILDRED REED WOOD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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FILED

OCT 15 1956

PAUL P. O'BRIEN, CLERK

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No. 15118

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MILDRED REED WOOD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.

STATEMENT OF JURISDICTION.

This is an appeal from a judgment in favor of the United States of America rendered by the United States District Court on November 22, 1955.

The District Court accepted jurisdiction over this case by virtue of the provisions of the National Service Life Insurance Act of 1940, as amended (Title 38, U. S. C. A., Secs. 445, 551, 817).

This court has jurisdiction of the appeal under the provisions of Title 28, U. S. C., Sec. 1291.

II.

STATUTES INVOLVED.

The policy involved was issued under the provisions of the National Service Life Insurance Act of 1940, as amended (54 Stat. 1009). The Act may be found in Title 38, U. S. C. A., Secs. 801-823, inclusive.

III.

STATEMENT OF THE CASE.

Subsequent to the death of Lawrence C. Reed, appellant Mildred Reed Wood, sister of the decedent, caused a claim to be filed in writing with the Veterans Administration for death benefits as beneficiary under a National Service Life Insurance policy upon the life of Lawrence C. Reed.

The claim was disallowed by the Veterans Administration and the administrative decision was affirmed by the Board of Veterans Appeals on October 31, 1950.

Appellant filed her complaint on September 23, 1954, alleging a right to recover the proceeds of \$10,000 upon the life insurance policy in question.

The appellee United States of America denied liability thereon and filed its answer, alleging that the said policy had lapsed for non-payment of premiums on February 1, 1948.

Trial was commenced on July 26, 1955 before the Honorable Jacob C. Weinberger, United States District Judge, and on November 22, 1955 the court rendered a judgment in favor of the United States of America.

Whereupon, the appellant prosecuted this appeal to this Honorable Court assigning certain errors.

IV.

STATEMENT OF THE FACTS.

On June 1, 1943, while Lawrence C. Reed was in active service in the United States Army, he applied for and was issued a five-year level term National Service Life Insurance Policy No. 10,815,106. The policy named the appellant, his sister Mildred Reed Wood, as beneficiary.

During his period of active service the premiums on the said policy were paid by a class "N" type allotment deducted from Lawrence C. Reed's active service pay through the period ending December 31, 1947.

Lawrence C. Reed was retired from the active service in the United States Army on December 31, 1947. The insurance premiums were discontinued on December 31, 1947 and the said policy lapsed for non-payment of premiums on February 1, 1948.

Upon retirement from the United States Army, Lawrence C. Reed received his full retirement pay each month, and no deductions from his retired pay were made for payments of the premiums on said insurance policy. No attempt was made to reinstate the policy or to pay the premiums to the Veterans Administration by direct remittance or otherwise. Lawrence C. Reed died on February 6, 1949.

Appellant assigns as error the judgment of the trial court as follows:

1. The court erred in refusing to enter a verdict for the relief prayed.

2. The court erred in adopting the conclusion that under no circumstances could the United States of America be found in effect to be estopped to protest the non-payment of premiums when the fault was due entirely to the negligence or error of the United States of America or its agents.

V.
ARGUMENT.

POINT I.

The Trial Court Did Not Err as the National Service Life Insurance Policy of the Decedent Was Not in Force Since the Policy Lapsed for Non-payment of Premiums.

Appellant Mildred Reed Wood, as beneficiary of the policy in issue has whatever rights that are available to one under the lapsed policy. As such, she can claim only the rights that the decedent may have had therein.

The court found that the decedent was retired from active service in the United States Army on December 31, 1947; that subsequent to his retirement from the Army he received his full retirement pay each month; that no deductions were made for payments of premiums on the insurance policy; and that Lawrence C. Reed died on February 6, 1949.

Army Regulation AR 35-5520 seems to indicate that a member of the Regular Army may, "if he desires," continue his Class N allotment for payment of premiums, and that "in such case no action is necessary on the part of the allotter." It seems to contemplate the execution of Form 141 if such an allotment is to be discontinued.

Though the foregoing may indicate that there was a failure of the Army to continue the deduction of insurance premiums from the retired pay of Lawrence C. Reed, it does not necessarily follow that the insurance premiums must be deemed to have been paid and that the insurance was in effect at the time of decedent's death. The responsibility for paying the premiums on the insurance is upon the insured. It was incumbent upon him

upon retiring from the service to take whatever action was necessary to keep the insurance policy in force. His allotment previously authorized to be made from his active service ceased when he commenced to receive retired pay.

Appellant argues that the notation heretofore referred to on DA-AGO Form 53-94 indicated an intention that the veteran was to "continue payment deducted from retirement pay" over the signature of the veteran and as such fully discharged his responsibility, so that no further action was necessary on his part.

It is well settled that where one retains the benefits to a transaction, he ratifies the transaction and is bound by it, and cannot avoid its obligations or effect by taking a position inconsistent with it. *Schumacher v. Harriett* (C. A. 4), 52 F. 2d 817; *1st Nat'l Bank v. Glens Falls, et al.* (C. A. 4), 27 F. 2d 64.

It is noted that the form also provided that the Army allotment, indicated in Col. 50 then in effect, was to be discontinued effective "31 Dec. 47." Thus, the decedent, by signing the form was put on notice that his allotment would be discontinued.

At the time of his retirement Lawrence C. Reed was employed as a civilian employee by the United States Army in the Canal Zone. He received the full retirement pay from the Army from January, 1948 until his death on February 6, 1949, a period in excess of one year. One is chargeable with knowledge of the law and when an individual voluntarily accepts benefits of a transaction, such acceptance is equivalent to consent to all the obligations arising from it, so far as the facts are known, or ought to have been known to the person accepting it.

12 Am. Jur. 517; *Cutting v. Bryan* (C. A. 9, 1929), 30 F. 2d 754, cert. den. 279 U. S. 860; *Shutte v. Thompson*, 82 U. S. 151.

One may waive any provision either of a contract or of a statute intended for his benefit. Thus, the estate of Lawrence C. Reed and the appellant is estopped to deny that the insurance lapsed for non-payment of premiums.

In the case of *Whiting v. United States* (C. A. D. C.), 122 F. 2d 196, the court applied this principle in a similar factual situation where a retired Army officer acquiesced in a Veterans Administration's ruling whereby he was paid disability benefits during his lifetime.

The case of *Riley v. United States* (D. C. W. Va.), 116 F. Supp. 155, affirmed on other grounds in 212 F. 2d 692 (C. A. 4), and *Joyner v. Ohio National Life Ins.* (C. A. 5), 118 F. 2d 1008, both involved circumstances indicating acquiescence in the action taken by the insurer as precluding a later contention that such action was erroneous. National Service Life Insurance (NSLI) is granted in consideration of premiums and the failure to pay any premium within the grace period causes the policy to lapse, unless the policy is otherwise kept in force under its terms. *Weiss v. United States* (C. A. 2), 187 F. 2d 610, cert. den. 342 U. S. 820, 72 S. Ct. 38, 96 L. Ed. 620; *Siller v. United States* (C. A. 5), 195 F. 2d 195; *Sawyer v. United States* (C. A. 6), 211 F. 2d 476.

The lapse of an NSLI policy is considered not to have occurred if an application for waiver of premiums is filed within the time required by statute and entitlement to waiver is established by the proof of continuous total disability of six or more months in duration during the period of time premiums were not paid. Title 38, U. S. C., Sec. 802(n); Title 38, C. F. R., Sec. 8.40.

This principle was illustrated in *United States v. Morrell* (C. A. 4, 1953), 204 F. 2d 490, cert. den. 346 U. S. 875, 98 S. Ct. 128, 98 L. Ed. 383, and *Kubala v. United States* (C. A. 5, 1954), 210 F. 2d 943.

It is noted that the case at hand is distinguishable for the reason that no waiver of premiums question is presented; and even waiver of premium cases have limitations requiring strict compliance with the statute in issue. The case of *Fox v. United States* (C. A. 5), 201 F. 2d 883, involved a serviceman who was a prisoner of war until September 12, 1945, he failed to file, by September 30, 1945, his claim for continuance of insurance and waiver of premiums on the ground of disability, the court held that the policy ceased and terminated as of the latter date under the NSLI Act.

National Service Life Insurance contracts, like the War Risk and United States Government Life Insurance contracts are not entered into by the Government for the purpose of gain. Therefore, the Government occupies a different position than the ordinary commercial or private insurance companies. Our courts have consistently held that the Government acts in such cases not in a proprietary capacity, but does so in its sovereign capacity. *James v. United States* (C. A. 4), 185 F. 2d 115; *McIndoe v. United States* (C. A. 9), 194 F. 2d 602; *McDaniel v. United States* (C. A. 5), 196 F. 2d 291; *United States v. Holley* (C. A. 5), 199 F. 2d 575.

Therefore, it is neither bound nor estopped by the acts or omissions of its officers or agents. *United States v. Loveland* (C. C. A. 3), 25 F. 2d 447; *Nierwiadomski v. United States* (C. A. 6), 159 F. 2d 683, cert. den. 331 U. S. 850, 67 S. Ct. 1730, 91 L. Ed. 1859; *James v. United States* (C. A. 4), 185 F. 2d 115; *McIndoe v. United States* (C. A. 9), 194 F. 2d 602; *McDaniel v.*

United States (C. A. 5), 196 F. 2d 291; *Rodgers v. United States* (E. D. Pa.), 66 F. Supp. 663; *Lollos v. Vet. Admin.*, 105 F. Supp. 870 (D. N. J.), aff'd (C. A. 3), 202 F. 2d 153; *Karas v. United States*, 118 F. Supp. 446 (M. D. Pa.), aff'd (C. A. 3), 214 F. 2d 130; *Morris v. United States* (E. D. N. C.), 122 F. Supp. 155.

The courts have held that funds of an insured in the hands of the Government because of the Government's non-insurance activities may not be applied to prevent lapse of an NSLI policy. In *United States v. Griffin* (C. A. 8), 216 F. 2d 217, cert. den. 348 U. S. 927, 75 S. Ct. 339, 99 L. Ed. 245, the court held that accrued service pay was not available to pay premiums of an NSLI policy. In *Mikell v. United States* (C. A. 4), 64 F. 2d 301, the court held that money due the insurer by the Government for difference in pay on account of a promotion was not applicable to pay premiums on the insured's converted war risk policies, so as to extend the life of the policy beyond insured's death.

The court further stated that the rule compelling a private insurer to apply moneys payable to an insured toward the payment of premiums to avoid forfeiture was held inapplicable to the Government, except possibly with respect to moneys due under insurance policies. In this *Reed* case it is noted that not only were the funds not arising under insurance policies but that such funds due the decedent were paid in full to him and accepted by him for over a year after the lapse of the policy.

In the case of *United States v. Smith* (C. C. A. 9), 67 F. 2d 412, this court was unanimously affirmed by the Supreme Court of the United States in its opinion rendered in the case of *Smith v. United States* (1934), 292 U. S. 337, 54 S. Ct. 721, 78 L. Ed. 1295.

The *Smith* case concerned a naval seaman who, in his first enlistment, applied for and obtained a policy of War Risk insurance. He executed an application for authorization for deductions of insurance premiums from his service pay. He held a certificate of continuous service, and his authorization was never formally revoked. There was sufficient money due him at the end of each month to meet the premium payments, but deductions for premiums were made only for the period of his first enlistment.

This court held that he accepted all his pay due him and made no effort to pay the premiums.

The Supreme Court stated at page 341:

“We are of the opinion there is enough to show abandonment of the contract by the assured and upon that ground the Circuit Court of Appeals should be affirmed.

“After expiration of the first enlistment, neither party to the contract appears to have treated as operative the authorization for deductions contained in the application. Zimmerman accepted every month during a considerable period the full amount due him; made no effort to provide for payment of premiums when he must have been aware that no deductions had been made. There is nothing to indicate that he did not have full possession of his faculties or lacked intelligence or probity, or that he was unaware of the circumstances. If he had supposed the insurance remained in effect, common honesty would have moved him to provide for actual payment of the premiums. He must have known they had not been met. In the circumstances his conduct, we think, adequately indicates the exercise of his right to abandon the policy. See *Sawyer v.*

United States, 10 F. 2d 416; *United States v. Barry*, 67 F. 2d 763; *contra*, *Unger v. United States*, 65 F. 2d 946.”

Unger v. United States (C. A. 10), 65 F. 2d 946, is distinguishable from the instant case in that the decedent made specific application to have deductions from his pay applied to War Risk Insurance. Furthermore, the question of waiver of premiums due to total disability of the decedent served to prevent the lapse of the policy. See *United States v. Ellis* (C. A. 5), 67 F. 2d 765.

The case of *Bouvier v. United States* (C. A. 9), 214 F. 2d 329, is distinguishable from the instant case because in *Bouvier* premium payments were actually made by the insured. Here, the decedent wilfully accepted his full Army retirement pay, he never tendered any premium payment to the Veterans Administration after his retirement.

Thus, there is no forfeiture involved, indeed, one may find that Lawrence C. Reed upon his retirement and lapse of the NSLI policy would consider that prospectively it was a wise thing to allow the lapse of the policy. The appellant ought now be allowed to complain under the circumstances.

The case of *United States v. LePage* (C. C. A. 1), 59 F. 2d 165, cited by the appellant ought not be considered as authority in this case for appellant's position for the decedent was in combat and he died from wounds received in combat during World War I. Congress provided gratuitous insurance for those in combat during World War II, however, the provisions limited benefits to a certain enumerated class of beneficiaries which if applied herein would not include the appellant. Title 38, U. S. C., Sec. 802(d).

It is noted that both the Veterans Administration and the Board of Veterans Appeals disallowed appellant's claim for benefits under the policy in issue. It is generally held that the established administrative construction is entitled to great weight and will not be overturned unless clearly wrong or a different construction is plainly required. *United States v. Citizens Loan & Trust Co.*, 316 U. S. 209, 214, 62 S. Ct. 1026, 86 L. Ed. 1387; *United States v. Madigan*, 300 U. S. 500, 505, 57 S. Ct. 566, 81 L. Ed. 767; *Boyet v. United States* (C. A. 5), 86 F. 2d 66.

POINT II.

The Trial Court Did Not Err in Its Decision in Refusing to Estop the Government to Deny the Non-payment of Premiums.

Appellant also bases her right to recover upon the alleged negligence or error of the United States of America or its agents. However, contractual liability of the United States cannot be grounded upon a negligent act, an unauthorized act or error of the United States or its agents. See *Federal Crop Insurance Corp. v. Merrill*, 332 U. S. 380, 92 L. Ed. 10; *Wilbur Nat'l Bank v. United States*, 294 U. S. 120, 79 L. Ed. 798; *Niewadomski v. United States* (C. C. A. 6), 159 F. 2d 683; *United States v. Norton* (C. C. A. 5), 77 F. 2d 731.

The United States is not amenable to suit unless it has consented to be sued. It has subjected itself to liability in damages for the wrongful acts or omissions of its agents or servants only to the extent authorized in the Federal Tort Claims Act. Since this is not a suit under the provisions of the Tort Claims Act, no recovery can be had on this theory.

The appellant in her second assignment of error has assumed that "the fault was entirely due to the negligence or error of the United States of America or its agents." It is submitted that this is an incorrect assumption for the deceased was the party in error and as in the case of *Smith v. United States, supra*, he should be deemed to have abandoned his insurance contract.

This point has been previously referred to under the previous argument. Your attention is respectfully directed to appellee's argument in answer to point one and that such be made applicable also to point two.

Conclusion.

The trial court did not err in granting judgment to the Government. There was no error of law in the rulings of the District Court. Therefore, the judgment should be affirmed.

Respectfully submitted,

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